# A TREATISE ON THE STATUTE OF LIMITATIONS.

(21 *Jac.* 1. *c.* 16.)

BY
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# ADVERTISEMENT.

*IN the following sheets, the decisions on the Statute* 21 *Jac.* 1. *c.* 16. *have been collected and arranged: the limitation being restrictive of a common law right, general in its application, and conclusive in its effect, will be a sufficient apology for this attempt; and the rather so, because the intention of the Legislature is not manifested in the wording of the Act, as is proved by the many questions that have arisen on its construction.*

CROWN-OFFICE ROW, TEMPLE,
21st *JULY*, 1810.

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A

# TREATISE

ON THE

# STATUTE OF LIMITATIONS.

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## *An Act for Limitation of Actions, and for avoiding of Suits in Law.*

(21 Jac. I. c. 16.)

For quieting of men's estates, and avoiding of suits, be it enacted, by the King's most excellent Majesty, the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, That all Writs of Formedon in Descender, Formedon in Remainder, and Formedon in Reverter, at any time hereafter to be sued or brought, of, or for any manors, lands, tenements, or hereditaments, whereunto any person or persons now hath or have any title, or cause to have or pursue any such Writ, shall be sued or taken within twenty years next after the end of this present session of Parliament: And after the said twenty years expired, no person or persons, or any of their heirs, shall have or maintain any such Writ, of or for any of the said manors, lands, tenements, or hereditaments; (2) and that all Writs of Formedon in Descender, Formedon in Remainder, Formedon in Reverter, of any

manors, lands, tenements, or other hereditaments whatsoever, at any time hereafter to be sued or brought by occasion or means of any title or cause hereafter happening, shall be sued and taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years; (3) and that no person or persons that now hath any right or title of entry into any manors, lands, tenements, or hereditaments now held from him or them, shall thereinto enter, but within twenty years next after the end of this present session of Parliament, or within twenty years next after any other title of entry accrued; (4) and that no person or persons shall at any time hereafter, make any entry into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title, which shall hereafter first descend or accrue to the same; and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made; any former law or statute to the contrary notwithstanding.

II. Provided nevertheless, That if any person or persons that is or shall be entitled to such Writ or Writs, or that hath or shall have such right or title of entry, be or shall be, at the time of the said right or title first descended, accrued, come or fallen within the age of one and twenty years, feme covert, non compos mentis, imprisoned, or beyond the seas, that then such person and persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action, or make his entry as he might have done before this act: (2) so as such person and persons, or his or their heir and heirs, shall within ten years next after his and

their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of, and sue forth the same, and at no time after the said ten years.

III. And be it further enacted, That all actions of trespass, quare clausum fregit, all actions of trespass, detinue, action sur trover, and replevin for taking away of goods and cattle, all actions of account, and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be sued or brought at any time after the end of this present session of Parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say); (2) the said actions upon the case (other than for slander), and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass, quare clausum fregit, within three years next after the end of this present session of Parliament, or within six years next after the cause of such actions or suit, and not after; (3) and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within one year next after the end of this present session of Parliament, or within four years next after the cause of such actions or suit, and not after; (4) and the said action upon the case for words, within one year after the end of this present session of Parliament, or within two years next the words spoken, and not after.

IV. And nevertheless, be it enacted, That if in any the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill; or if any the said actions shall be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry, that in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit, from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after.

V. And be it further enacted, That in all actions of trespass, quare clausum fregit, hereafter to be brought, wherein the defendant or defendants shall disclaim in his or their plea to make any title or claim to the land in which the trespass is by the declaration supposed to be done, and the trespass be by negligence, or involuntary, the defendant or defendants shall be permitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass before the action brought, whereupon, or upon some of them, the plaintiff or plaintiffs shall be enforced to join issue; (2) and if the said issue be found for the defendant or defendants, or the plaintiff or plaintiffs shall be nonsuited, the plaintiff or plaintiffs shall be clearly barred from the said action or actions, and all other suit concerning the same.

VI. And be it further enacted by the authority aforesaid, That in all actions upon the case for slanderous words, to be sued or prosecuted by any person or persons in any the Courts of Record at Westminster, or in any Court whatsoever, that hath power to hold plea of the same, after the end of this present session of Parliament, if the jury upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action, shall have and recover only so much costs as the damages so given or assessed amount unto, without any further increase of the same; any law, statute, custom, or usage to the contrary in anywise notwithstanding.

VII. Provided nevertheless, and be it further enacted, That if any person or persons that is or shall be entitled to any such action of trespass, detinue, action sur trover, replevin, actions of accounts, actions of debt, actions of trespass for assault, menace, battery, wounding or imprisonment, actions upon the case for words, be or shall be, at the time of any such cause of action given or accrued, fallen or come within the age of twenty-one years, feme covert, non compos mentis, imprisoned, or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discovert, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment, should be done.

# LIMITATION OF ACTIONS.

## CHAP. I.

### *Of Writs of Formedon.*

The first section of this statute concerns Writs of Formedon and Rights of Entry; the second section saves the right of action or entry, to those who, at the time the right accrues, are under any of the disabilities therein mentioned.

Formedon (a) is a real action, which lies for the issue in tail after the death of his ancestors, or for him in remainder or reversion after the estate tail determined, and is called Formedon, because the writ comprehends the form of the gift.

The proceedings in this action, as in all other real actions, being dilatory and expensive, it is now seldom brought; but it is a proper remedy in many cases, and still in use: Writs of Formedon may be considered under the following heads, viz. the Formedon in Descender, the Formedon in Remainder, and the Formedon in Reverter.

Formedon in the Descender is an action ancestrel droiturel, which lies for the issue in tail, upon a violation of that right which descends to him from his ancestor,

(a) Bac. Abr. tit. Formedon (A.) F. N. B. 211. (I.)

according to the form of the gift, and is in nature of a Writ of Right, being the highest writ that an issue in tail can have.

This writ lay not at Common Law, but was given by Westm. 2. cap. 1. the form of which is set forth in the statute; for at Common Law all estates tail were fee simple conditional; and the donee, by having issue, might have aliened the estate, or forfeited it, in which cases the issue had no remedy; but when by this statute, called the statute de donis conditionalibus, the donee was deprived of this power; it was also necessary that the issue should have a remedy against the alienation or discontinuance of his ancestor, and therefore the Formedon in Descender was given.

Formedon (*a*) in Remainder lies where a gift is made in tail or for life, remainder in tail or in fee, and the tenant in tail or for life, aliens or is disseised, and dieth without issue, he in remainder, or his representative, may bring their Formedon in Remainder.

This writ, as it lies for him in remainder after an estate tail, is grounded upon the equity of the statute de donis; for a Formedon in Remainder did not lie upon an estate tail at Common Law, because it was a fee simple conditional, whereupon no remainder could be limited, because of the danger of a perpetuity, which was always against the policy of our law.

(*a*) Bac. Abr. tit. Formedon (A.) F. N. B. 217, 218 (A.)

Formedon (*a*) in Reverter lies, where the donee in tail, or his issue, die without issue, and a stranger abates, or they who were seised by force of the entail discontinue the same; in either of these cases, the donor or his heirs may have a Formedon in Reverter.

This writ lay at Common Law; for though at Common Law the estate tail was a fee simple conditional, so that by having issue, the donee, by alienation, &c. might have barred the possibility of the donor's right of reverter, yet the having of children was in the nature of a condition precedent; and therefore if the donee never had a child, the donor might bring his Formedon in Reverter, and recover against any alienation or disposition of the donee.

At Common Law there does not appear to have been any stated or fixed time for the bringing of actions; for though it be said by Bracton (*b*), that "omnes actiones in mundo infra certa tempora limitationem habent," yet Coke says (*c*), that the limitation of actions was by force of divers acts of Parliament, and that the general position of Bracton admits of several exceptions.

But Formedons (*d*) were not within any of the ancient limitations; the seisin of the donee was never traversable till the stat. 32 H. 8. c. 2. wherein it is enacted, "that all Formedons in Reverter, Formedons in Remainder, and scire facias, upon fines of any manors, lands, tenements, or other hereditaments, shall be sued and taken within fifty years next after the title and cause of action fallen, and at no time after the said fifty years passed." Lord Coke

(*a*) Bac. Abr. tit. Formedon (A,) F. N. B 219. (*b*) Lib. 2. fol. 228.
(*c*) Co. Lit. 115 (*d*) 3 Dyer, 278.

observes (*a*), that this act extendeth not to a Formedon in Descender; and Mr. Hargrave, in his note 148, on this observation, says, that the statute mentions Formedons in Remainder and Reverter, and limits them to fifty years; but omits Formedon in Descender. Nor is the latter deemed to be comprehended within the clause of the statute relative to Writs of Right: for a Formedon is not, in the strict sense, a Writ of Right, though it certainly is in the nature of one, the mere right being equally triable in both. Accordingly, in the case cited by Lord Coke from Dyer, three judges held that a Formedon in Descender was not within the statute; the other judges doubted: and a case to the same effect is referred to from Bendloe's Reports, 194. But as the 21 Jac. 1. c. 16. requires Formedons of every kind to be brought within twenty years after the descent of the title, this defect of the former statute is now of no consequence.

The principle which ruled the construction of the statute of Henry, as applied to the bringing of Writs of Formedon, is not affected by the statute of James; but since the passing of the latter statute, there is not to be found in the Books, an instance wherein the limitation of twenty years has been objected to a Writ of Formedon.

In consequence (*b*) of the words "first descended or fallen," if a person entitled to an estate tail, with remainder over, neglects to bring his Writ of Formedon within twenty years after his right accrues, he and his issue will be for ever barred. But the person in remainder will be allowed twenty years, from the determination of the preceding estate tail, to bring his Writ of Formedon, although

(*a*) Co. Lit. 115. (*b*) 3 Cruise Dig. 541.

such preceding estate tail should continue for centuries; but although he be barred of his Formedon, he is not thereby hindered to pursue his right of entry which afterwards accrues to him.

In (*a*) ejectment on the demise of R. Gwillym, the jury, on not guilty pleaded, found that T. Andrews was seised in fee of the tenements in question; that he had issue Mary, after married to J. Gwillym, who had issue Thomas, and he had issue Thomas, who had issue the lessor; that T. Andrews conveyed the premises to the use of himself and Eleanor his wife for their lives, remainder to Mary Andrews his daughter, and the heirs of her body by the said J. Gwillym, with other remainders over. T. Andrews and his wife died, and the said J. Gwillym and his wife entered; that they both died, and T. Gwillym their son entered; that the tenements are parcel of the manor of W., which is ancient demesne; that by the custom there, fines founded on Writs of Right close, are levied in the court of the manor; that 29th May, 1646, the said Thomas levied a fine sur concessit to three for their lives, reserving a yearly rent, but not the ancient rent; which fine is said to be levied in Placito Conventionis; that Thomas Gwillym and his wife, 2d June, 24 C. 1. levied a fine sur cognusance de droit comme ceo, &c. with warranty to T. Marret and his heirs, to the use of the said T. Gwillym in fee; that T. Gwillym the father, 1 Nov. 24 Car. 1. by indenture inrolled before a justice of the peace, &c. conveyed the premises to T. Payne, the defendant's ancestor, in fee; that T. Gwillym died 20th June 1663, the said T. Gwillym, junior, then being of the age of twenty-one years, who died, having issue the

(*a*) Lutw. 770.

lessor; that the survivor of the said three lessees died 17th Sept. 1693; that thereupon the defendant entered, and the lessor being of the age of twenty-one years, entered upon them. The jury then found the lease, entry, and ouster; and if, &c. The Court were of opinion, that nothing appeared on the record whereby the entry of the lessor was barred, and therefore judgment was given for him.

But a Writ of Error was brought, and the judgment affirmed by the opinion of all the judges of the King's Bench, who delivered their opinions seriatim, and, amongst other points, resolved unanimously,—

That the plaintiff's lessor is not barred by the statute of 21 Jac. 1. of Limitations, although twenty years were passed after the right of action (scil. Formedon) accrued. For although he was barred of that action after twenty years past, yet he had title of entry only after the discontinuance for three lives was determined; and he shall have twenty years for entry after his title of entry accrued to him, which in this case was by the determination of the lease for three lives, and that was within twenty years before the action brought.

But (*a*) to reverse this judgment, and the affirmance of it, a Writ of Error was brought in Parliament; and on behalf of the plaintiffs in error it was said, that there were three questions in the case; first, whether the first fine levied by the tenant in tail in ancient demesne, worked a discontinuance? for if not, then the plaintiff's title of entry commencing above twenty years before, was barred by the Statute of Limitations.

(*a*) Brown' Parl. Cas 67

Secondly, whether the discontinuance, if any, determined with the estate for three lives, granted by that fine, or still continued, to bar the entry of the issue in tail; either by means of that fine, or the second fine with warranty, or any other conveyance in the cause?

Thirdly, whether, as the plaintiff had lapsed the twenty years given him by the statute to bring his Formedon, and so was barred of his right of action, he was not also, for the same reason, barred of his right of entry?

As to the first question, it was argued, that a court of ancient demesne to take a fine, being disabled by stat. 18 Ed. 1. which enacts, "that no fine shall be levied without writ original, and this before the Justice of the Common Pleas or in Eyre, and not elsewhere;" and that the statute being formed in the negative, would prevail against any custom pretended, or even found, to support such fine; and, being general, would destroy the power of that court to take a fine to any effect whatsoever. But if such a court could take fines by virtue of a custom, yet, that this particular fine was not levied pursuant to the custom; because it did not appear to be founded on a Writ of Right close; which writ is in the nature of a commission authorizing the lord to take the fine; if therefore the court had no jurisdiction to take a fine, or if the custom of a manor was not pursued, the fine was consequently void, and could never work a discontinuance. That the reason given by Lord Coke, 1 Inst. 383. why any fine works a discontinuance, is, that it is a feoffment of record; but this fine could not be said to be in the nature of such feoffment, because levied in a court which was not of record; and not being within the reason, ought not to be within the rule, of

other fines of record, which do discontinue estates; and if, for these reasons, there could be no discontinuance, the consequence was, that the right of entry of the issue in tail, commenced immediately upon the death of the tenant in tail, which happened in 1663, above twenty years before the issue entered, and therefore this entry was barred by the Statute of Limitations.

As to the second question, it was insisted, that the discontinuance, if any, did not determine with the estate for three lives, but still continued to bar the entry of the issue in tail, by the Common Law; because a fee passed by the first fine to the connuzee, by force of the words, connuzans de droit, which are ever intended of the fee; the words right and fee being synonimous terms, as appears from 1 Inst. 345-6; and right is the proper term of art, to carry the fee in the acknowledgment of a fine, and so constantly used; and if the fee passes by that conveyance, or act, which originally causes the discontinuance, that discontinuance must be for the whole fee; and on this account differs from all the cases in Lit. sec. 621, 1, 2. where the first grant passed only an estate for life, and therefore originally made a discontinuance for that life only. But if, in this case, the first fine alone would not work a discontinuance in fee, yet the second fine and warranty would, in order that the warranty might be preserved; and which would be lost and void, if the issue might enter, for then the connuzee has no opportunity of making use of it; and for this reason, in Lit. sec. 601. the warranty is held to be a discontinuance, where the grant without the warranty would be none; and the same is also laid down in divers other books, in parallel cases.

And as to the third question, it was contended, that the entry of the lessor of the plaintiff was barred by the Statute of Limitations; which enacts, that no person shall enter in to any lands, but within twenty years after his right or title shall first descend or accrue. In this case, the first right or title that descended, was a right of action, viz. a Formedon, which accrued to the issue immediately on the death of the tenant in tail, which happened above thirty-five years ago; and the issue, having neglected for above twenty years to sue for the estate, was thereby barred not only of his *action*, but of his entry also. For otherwise a man might enter into lands, when he had no way by law to recover them, having lost that remedy by his own default; which would be absurd and inconvenient, with respect to purchasers, and disturbance of long possessors. And in the case of *Saule* v. *Clarke* (*a*) it was adjudged, where tenant in tail leased for life, and afterwards granted the reversion by fine, and died without issue, and he in reversion did not bring his Formedon in five years, as he might; that he could not enter after the death of lessee for life, though then the discontinuance determines here; because the reversioner had but one right, though several remedies; and having pretermitted the first, was foreclosed of the second by the statute.

On the *other side* it was contended, that the only question in this case was, whether the lessor of the plaintiff might lawfully enter, after the determination of the estate for three lives, granted by the first fine; for it was not pretended, that a fine levied in a court of ancient demesne would bar an estate tail at this day. That the first fine made a discontinuance of the estate, and took away the

(*a*) Jones 208. Cro. Car. 156.

entry of the issue in tail, during the lives of the lessee only; but the grant of the reversion by the second fine did not make a discontinuance in fee; and consequently, when the last life dropt, in September 1693, the discontinuance was determined, and the right of entry revived; and therefore Richard Gwillym, the issue in tail, might lawfully enter, and was not barred by the Statute of Limitations, his right not accruing till 1693.

After hearing counsel on this Writ of Error, it was ordered and adjudged, that the judgment given in the Court of Common Pleas, and the affirmance thereof in the Court of Queen's Bench, should be affirmed.

The case of *Saule* v. *Clarke* (*a*) above cited was this; A. S. being tenant in tail male, and reversionee fee to John, his eldest brother, made a lease for three lives, not warranted by the statute; then a fine with proclamations was levied by Alexander to one Taylor, and then Alexander died without issue male, living the lessee for life. Five years and more expired in the life of John, after the death of Alexander. John his brother died without issue, Elizabeth, the daughter and heir of Alexander, being niece and heir of John, the lease for three lives expired; and if Elizabeth was barred by this fine and non claim was the question.

And after many arguments at the bar, and after at the Bench, all the judges were of opinion that Elizabeth was barred; for when John, who had the *right* at the time of the death of Alexander without issue male, had not prosecuted that title, it is a bar; and he shall not have any

(*a*) Lutw. 781.

advantage of entry after the death of tenant for life; because he had not any other title after his death than he had before; for his title was by the death of tenant in tail without issue male, and then he might have brought his Formedon; and when he doth not pursue his title which first vested, he and his heirs shall be barred; and they shall not have five years after the death of the tenant for life; which reason, it was contended, was agreeable to the case in question.

The (*a*) Court of Queen's Bench, in the first Writ of Error brought in the above case of *Hunt* v. *Bourn*, held that supposing the plaintiff barred of his Formedon, yet he is not thereby hindered to pursue his right of entry, which accrued to him by the death of tenant for life; for that is a new right which he had not before: that when a man releases his right, he cannot pursue his action or remedy; but if a man has a right and several remedies, the discharge of one is not a discharge of the other; and that the Statute of 4 H. 7. of Fines enures and operates by way of bar to the right, which answers *Saffe* and *Clarke's* case; but that the Statutes of Limitations operate by way of bar to the remedy: and the word *right*, in the statute 21 Jac. 1. c. 16. is right of entry.

(*a*) Salk. 422.

## CHAP. II.

### *Right of Entry.*

WHEN THE STATUTE RUNS,—OF POSSESSION.

RIGHTS of Entry are tried in Ejectment, in which action the plaintiff recovers on the strength of his own title, and not on the weakness of that of the defendant (*a*); he recovers a possession; and the right to that possession, since the statute of 21 Jac. 1. c. 16. must have accrued within twenty years of the action brought; therefore (*b*) when there hath been no possession within that time, either in the lessor of the plaintiff or his ancestors, the plaintiff in this action will be nonsuited, unless he can account for it under some of the exceptions allowed by the statute.

This statute in strictness may be considered to apply only to that species of property whereon an entry could be made; but like Ejectment, it would perhaps be extended beyond those limits.

The Crown was not bound by any of these statutes, the ancient doctrine being—"Nullum tempus occurrit regi." But by a late statute (*c*), the Crown is barred from recovering any estate or hereditaments (other than liberties or franchises) where the title did not first accrue within the last sixty years.

(*a*) 5 T. R. 110. (*b*) 1 Burr. 119. (*c*) 9 G. 3. c. 16.

And also ecclesiastical (*a*) persons are not bound by any of the Statutes of Limitations, because it would be a side-wind, to evade the statutes made to prohibit their alienations. With these exceptions, it applies to all persons capable of a right to enter.

It runs immediately on a possession adverse to the true owner's title, and after twenty years takes away his right of possession, and confers a positive title to the defendant; for although Lord Raymond reports it to have been held in the case of *Reading* against *Rawsterne* (*b*), that the Statute of Limitations does not bar a man but where there is an actual disseising; and by Salkeld (*c*), that the statute never runs against a man but where he is actually ousted or disseised; the Court must have considered the terms ouster and disseisin as synonimous, and used them indifferently, otherwise that was not the true construction of this statute.

Seisin (*d*), in its genuine meaning, denotes the completion of that investiture, by which the tenant was admitted into his freehold. And disseisin, therefore, must mean, some way or other, turning the tenant out of his tenure, and usurping his place and feudal relation.

It is obvious how a man may visibly be the copyholder or customary freeholder *de facto*, in prejudice of the rightful tenant: It is obvious too, that usurping such copyhold or customary tenure, is a different fact, from a naked possession or occupation of the land.

(*a*) Comp. Incumb 429. (*b*) Ld. Raym. 829. (*c*) Salk. 422.
(*d*) 1 Burr. 107.

Disseisin was a complicated fact, and differed from dispossessing. The freeholder by disseisin, differed from a possessor by wrong. Bracton, c. 2. de Assisa Novæ Disseysinæ, fo. 160 puts many cases of possession wrongfully taken, which he calls intrusion; because there is no disseisin: "Possessio quæ nuda est omnino, et sine aliquo Vestimento, quæ dicitur intrusio." *Vestimento* is seisin, investiture; (from whence the Saxon word *Vest*;) a metaphor the feudists took from clothing: by which they meant to intimate, "that the naked possession was clothed with solemnities of the feudal tenure."

After the assize of novel disseisin was introduced, the legislature, by many acts of Parliament, and the courts of law, by liberal constructions in furtherance of justice, extended this remedy, for the sake of the owner, to every trespass or injury done to his real property; if, by bringing his assize, he thought fit to admit himself disseised.

Littleton, who wrote long after the remedy by assize was enlarged, and speaks of disseisins with an eye to that remedy, defines disseisin with an &c.(*a*) Where a man enters into lands or tenements (where his entry is not congeable) and ousteth him which hath the freehold, &c. the Comment says, "Every entry is no disseisin, unless there be an ouster of the freehold." And Co. Lit. 153. says, "Disseisin is putting a man out of seisin, and ever implies a wrong: but dispossession or ejectment is putting out of possession, and may be by right or wrong.—Disseisin est un personal trespass de tortious ouster del seisin."

(*a*) Litt. s. 279.

Since the remedy by assize of novel disseisin, actual disseisin means a disseisin as it was understood to be before that time; and is so called to distinguish it from disseisin at the election of the party.

If the Statute of Limitations did not bar a man, but where he was actually disseised, it would be nearly inoperative, as it would require him to have a right to the freehold, and also a right of entry, which do not always unite; for an actual disseisin can only be of the freehold; and the statute applies to rights of entry.

Also, the specific, the only remedy to enforce a right of entry, is by ejectment; and where (*a*) an ejectment is brought, there can be no disseisin; because the plaintiff may lay his demise when his title accrued, and recover the profits from the time of the demise. The entry confessed is previous to making the lease: but there is no real or supposed re-entry, after the ejectment complained of. If it was considered as a disseisin, no mesne profits could be recovered without an actual re-entry.

It would also defeat the intention of the legislature, in setting at large from the operation of the statute all estates less than freehold: and an ejectment might be maintained on a right of entry accrued five hundred years before.

And with respect to the defendant it would require, that he should not only have turned the real owner out of his possession, but that he should have vested himself in

(*a*) 1 Burr. 111.

the seisin; that he should have clothed his naked possession with the solemnities of the feudal tenure.

The case in which the Court put the above construction on the Statute of Limitations was, where a stranger entered upon the lands, and received the profits, with the true owner, for more than twenty years; the words actual ouster must have been used with reference to that circumstance, and to distinguish such an entry, from an entry where the owner is put out of possession, and not as a general rule; because a very small proportion of the rights to enter accrue from a personal violence; and yet it is conceived that this statute runs on every such right.

It was observed by Lord Mansfield (*a*), "that some ambiguity seemed to have arisen from the term *actual ouster*, as if it meant some act accompanied by real force, and as if a turning out by the shoulders were necessary; but that is not so: A man may come in by rightful possession, and yet hold over adversely without a title. If he does, such holding over, under circumstances, would be equivalent to an actual ouster. For instance, length of possession under a particular estate, as a term of one thousand years, or under a lease for lives, as long as the lives are in being, gives no title; but if tenant pur autre vie hold over for twenty years after the death of cestuy que vie, such holding over will, in ejectment, be a complete bar to the remainder man or reversioner, because it was adverse to his title.

The plaintiff (*b*) must shew a right of possession as well as of property: and therefore the defendant need not

(*a*) Cowp. 217. (*b*) 1 Burr. 119.

plead the Statute of Limitations as in other cases. In Taylor ex dem. *Atkins* v. *Horde*, the defendant pleaded the general issue; and the jury found a special verdict: the Court determined for the plaintiff on the right, but against him on the remedy; for they held that he was barred by the Statute of Limitations (*a*). On which judgment he brought a writ of error in the House of Lords; who determined the latter point first and separately; and holding the plaintiff to be barred of his remedy by ejectment, affirmed the judgment, without entering into the other point upon the right.

But the verdict must shew how the possession has been: In the case *Jones* v. *Morley* (*b*), there was an uncertainty in that respect, upon the special verdict, so that there might have been a question whether the lessor of the plaintiff were not barred by the Statute of Limitations. And by the Court, if Anne were out of possession in 1667, when her husband Edward Morley died, then the Statute of Limitations took place from that time, and so the plaintiff might be within the statute; but that is not found by the jury expressly, and the Statute of Limitations shall not be taken by construction to bar a man of his action, unless it be expressly found how the possession hath been.

And an uninterrupted possession for twenty years gives a complete possessory right. If H. (*c*) has possession of lands for twenty years uninterrupted, and then B. gains possession, upon which H. brings ejectment; though H. is plaintiff, yet his possession for twenty years will be a good title for him, as well as if H. had been then in pos-

(*a*) Run. Ejec. 59. (*b*) Ld. Raym. 287. (*c*) Ld Raym. 741.

session, because possession for twenty years now by virtue of the statute 21 Jac. 1. c. 16. s. 1. is like a descent at Common Law, which tolls the entry.

Possession, is either in fact, or in contemplation of law, and in either case, while it remains in the owner, the statute does not run; therefore, if a stranger enter upon the true owner, and they divide the profits for more than twenty years, the true owner may maintain ejectment notwithstanding, for the other moiety, because he was never out of possession.

A. being (*a*) seised in fee of lands, had issue two daughters B. and C. B. marries, and has issue D. and dies; A. devizes the land to D. and his heirs, and dies; D. dies; and the heir of D. of the part of his father, and the heir of D. of the part of his mother, entered into the lands, and took the profits for more than twenty years before this action brought; which action was brought by the plaintiff as devisee of ——— Bernard, who was heir of D. of the part of the father of D.

A question was, whether the taking of the profits by the heir of the part of the mother of one moiety, should not bar the heir of the part of the father, after quiet enjoyment for twenty years, by the Statute of Limitations, from bringing an ejectment. And the whole Court held that it should not. For (by them) the Statute of Limitations does not bar a man, but where there is an actual disseising. Now here the bare taking of the profits is not an actual disseising. Besides that where two men are in possession of land, &c. the law adjudges it to be the

(*a*) Ld. Raym. 829.

possession of him who hath the right, until he be actually disseised. The lessor of the plaintiff and the defendant were not tenants, for the defendant was a mere stranger; and though he took a moiety of the profits, that would not make him tenant in common; for a man cannot disseise another of an undivided moiety, as he may of such a number of acres. But farther, if they had been tenants in common, it is true, that one tenant in common may disseise the other; but that must be an actual disseisin, as the hindering him from coming upon the land, &c. and not by a bare perception of the profits. As to the objection, that the bringing of the ejectment for a moiety admits him to be out of the possession of it, Holt denied it to be so. For if A. seised of land, makes a lease of one undivided moiety, and I. S. ousts the lessee, he must bring his ejectment for a moiety; so if they were both put out of possession, they must have several remedies, as several assizes, &c. Judgment was for the plaintiff.

But the general possession of the lord is not such a possession, either in fact or law, as will avoid the Statute of Limitations. In (*a*) ejectment for mines, the plaintiff proved himself lord of the manor, and in possession thereof; but the same witness proving that the defendant had had possession of the mines above twenty years, the Court, upon a trial at bar, held this no evidence to avoid the Statute of Limitations, there being no entry within twenty years upon the mines, which are a distinct possession, and may be different inheritances; and therefore directed the jury to find for the defendants.

(*a*) Str. 1141.

So if an ejectment (*a*) be brought by a lord against a cottager, twenty years possession is a good title; for if the possession of the manor should be a possession of the cottage, the lord would have a better title to that than to any part of his estate; yet a distinction has been taken and allowed by all the Judges, on a case reserved by Lord Chief Baron Pengelly, that if a cottage is built in defiance of a lord, and quiet possession has been had of it for twenty years, it is within the statute: But if it were built at first by the lord's permission, or any acknowledgment has been since made, (though it were one hundred years since) the statute will not run against the lord; for the possession of a tenant at will for ever so many years is no disseisin; there must be a tortious ouster; and it is not to be presumed a country fellow should build in opposition to the lord, unless it be shewn, or conveyances are produced.

The lord (*b*), on the death of a copyholder of inheritance, after three proclamations for the heir to come in and be admitted, seized the estate into his own hands, and afterwards granted it in fee to another: the Court considered this absolute seizure as irregular, there being no custom to warrant it, and that it could not afterwards be set up as a seizure quousque. In the case stated it appeared, that a fine was levied in the Court of Common Pleas, in the thirty-first year of his late Majesty's reign, by which it was argued an absolute forfeiture was incurred; and which could not be done away by any subsequent act.

(*a*) Bul. N. P. 103. (*b*) 3 T. R. 172.

Lord Kenyon, Ch. J. in giving his opinion on the case, which was decided on other grounds, observed, with respect to the supposed forfeiture, I do not see why the Statute of Limitations, which operates as a bar to other rights of entry after twenty years, should not bar the lord in this case. It seems to me, that he should have availed himself of his right of entry within twenty years. However, on this ground, I give no positive opinion.

By Ashurst, J. With respect to the forfeiture by the fine which was levied in the late reign, it should have been presented at his court as a forfeiture; for the lord was not bound to take advantage of the forfeiture; and here there does appear sufficient on the rolls of the court to shew that the lord had waved it.

Buller, J. Besides, there is great weight in my Lord's last objection, that at the distance of more than twenty years he could not enter for a forfeiture.

Where one holds lands, &c. as lessee, his possession in contemplation of law, is the possession of the lessor (*a*). So the possession of one tenant in common, joint tenant, or parcener, is the possession of his co-tenant or co-parcener, therefore he in possession must do some act amounting to a denial of the right of his fellow, or omit some duty from which a jury would infer such denial, before his possession can be adverse, and within the statute. But Holt, Ch. J. in the *Earl of Sussex* v. *Temple* (*b*), is reported to have said, that as to the possession of one

(*a*) 2 Brown 298. 1 Wils. 176. 3 Wils. 521. (*b*) Ld. Raym. 312.

tenant in common being the possession of the other, that does not hold place against the Statute of Limitations. And besides, that if one of them only takes the profits, it is an ousting of the other. It is to be observed, however, that the same Judge held differently in the case of *Reading* v. *Rawsterne* (*a*), which was decided many years after; for he there said it was true, that one tenant in common might disseise the other; but that must be an equal disseisin, which he explains to be the hindering him from coming upon the land, &c. and not by a bare perception of the profits.

Indeed, the case of the *Earl of Sussex* against *Temple* has been doubted (*b*). And by Lord Hardwicke, Chan. (*c*) it has been said, that the Statute of Limitations will not run against one joint tenant or tenant in common, unless an actual ouster is made. And to be sure there ought to be some ouster: but if after such ouster a tenant in common, or joint tenant, continue in possession of the whole for twenty years, it is a bar.

On the 17th August 1721 (*d*), at a Court held for the Forest of Knaresborough (where lands pass by surrender and admittance), Jane Shackleton and Patience Readshaw were respectively admitted tenants in fee simple, each to one undivided moiety of certain lands in the occupation of William Lawson.

17th July 1723, Emanuel Simpson and Patience his wife, late Readshaw, were admitted on their own surrender,

(*a*) Ld. Raym. 830. (*b*) Run. Ejec. 191. (*c*) 2 Atkyns 649.
(*d*) Bl. 690.

to her moiety; to hold to said Emanuel and Patience, their heirs and assigns: 1724 said Patience died; and 20th April 1728, said Emanuel died; both without issue. 29th May 1728, Benjamin Empson was admitted to said moiety, in fee simple, as brother and heir to the said Emanuel.

Hil. 2 Geo. 2. (1728-9), Benjamin Empson obtained judgment by default in ejectment, against William Lawson, in the Common Pleas; and said Lawson, 10th April 1729, attorned tenant to Benjamin Empson, and paid him afterwards one year's rent of said moiety.

5th June 1734, Benjamin Empson died; and 24th July 1734, Benjamin Empson (an infant of nine years) was admitted to said moiety in fee simple, as nephew and heir to the other Benjamin.

9th August 1754, this Benjamin Empson died, leaving James, the lessor of the plaintiff, his son and heir; an infant of ten years, who, on the 15th October 1766, was admitted tenant in fee simple.

Jane Shackleton died in 1729, leaving the defendant her son and heir; who being an infant, was admitted to her moiety in fee simple, 13th August 1729.

In 1744, William Lawson, by leave of Mr. Shackleton, gave up the farm to his son Christopher, who paid Mr. Shackleton the whole rent then due for the premises, and has paid Mr. Shackleton the whole rent ever since. And no other payment appears than is above stated. A verdict

was found for the plaintiff, subject to the opinion of the Court on the question—

Whether the plaintiff was barred from recovering by the Statute of Limitations?

It was argued, that he never was out of possession, that the statute therefore did not bar him: that parceners, joint tenants, and tenants in common, have a joint possession, a joint occupation, joint management of the whole; the possession of one is the possession of both: therefore, the possession of William Shackleton was the possession of James Empson, and he was never actually ousted. Perception of profits does not amount to an expulsion. That one tenant in common may indeed disseise another; but then it must be by actual disseisin, and not by bare perception of profits only; and the Statute of Limitations never runs against a man, but where he is actually ousted or disseised; and the cases cited were, *Reading* against *Royston*, 2 Salk. 423. and 2 Lord Raymond 829. and the case of *Ford* against *Lord Grey*, 6 Mod. 44. 1 Salk. 285. where the first resolution is express, "that the possession of one joint tenant is the possession of the other, so far as to prevent the Statute of Limitations."

On the other side it was contended (*a*), that there was a difference between joint tenants, and tenants in common. But if there were not, yet the case of the *Earl of Sussex* against *Temple*, 1 Ld. Raymond 310. is contrary to 2 Ld. Raymond 829. for Holt there says, that as to the possession of one tenant in common being the possession

(*a*) 5 Burr. 2604.

of the other, that does not hold place against the Statute of Limitations; and besides, that if one of them only take the profits, it is an ousting of the other: and it was said, that the case of *Storey* against *Lord Windsor and others*, 2 Atkyns 632. was in point, since the statute of Queen Anne: that the Court could not now attend to an old observation, "that the possession of one is the possession of the other." The possession of one tenant in common is now as adverse as the possession of any other person. And it is a bar after twenty years. Lord Mansfield stopped the reply, and laid it down, that there must be an adverse possession, in order to enable the Statute of Limitations to run. There must be a disseisin, and a disseisin strictly proved. And he referred to the case of *Taylor* ex dem. *Atkyns* v. *Horde*, Burr. 60. and to Fermor's case. But here is no disseisin. The sole title of the defendant is his admittance, in 1729, to an undivided moiety of the premises. He is so far from a disseisor, that he allows the title of the others.

If there had been a question about ouster, it might have been a fact to be left to a jury. But I am clear that the defendant never meant to disseise the plaintiff, nor thought of it. The tenant was never desired to attorn for the whole; he only attorned for an undivided moiety, and once paid rent for the same. And Shackleton once received rent alone for the whole, without paying any of it over to the other; but this is no actual ouster.

Mr. Justice Willes and Mr. Justice Blackston concurred (Mr. Justice Aston was absent in Chancery): Here is no adverse possession; no keeping the plaintiff out of possession. One tenant in common has received the rent,

and not accounted for it to the other; but here is no expulsion, no ouster.

On motion for a new trial, in the case (*a*) *Doe* ex dem. *Fisher and wife*, and *Taylor and wife* versus *Prosser*, Lord Mansfield reported the case to be, an ejectment brought by the plaintiff for an undivided moiety of certain lands in Enfield, in the county of Middlesex. The lessors of the plaintiff claimed title under Mary Taylor, who was tenant in tail in common of the lands in question, with the sister, under the will of one Perkins. The sister was married to Stevens, after which, in the year 1705, there was a deed of partition, between Mary Taylor and Stevens, for the life of Stevens; by which deed all the lands in Enfield were allotted to him, and under which he enjoyed them till the year 1734, when he died: Mary Taylor died some years before. From the year 1734, one tenant in common, namely, the wife of Stevens, had been in the sole possession of these lands, without any claim or demand by any person or persons claiming under Mary Taylor, deceased, the other tenant in common. No actual ouster was proved; but that Lord Ch. J. Mansfield left it to the jury to say, whether there was not sufficient evidence before them, to presume an actual ouster. And supposing there was an actual ouster, in that case the lessors of the plaintiff were barred by the Statute of Limitations. The jury found, there was sufficient evidence to presume an actual ouster.

It was argued for the plaintiff, that it is a general rule of law, that the possession of one *tenant in common* is the possession of both; and there is no ground for any dis-

(*a*) Cowp. 217.

tinction in this case, so as to take it out of the general rule. If an actual ouster had been proved, it would have been different; but here, no evidence whatsoever is given of any actual ouster, or of a tortious possession; on the contrary, it appears that the possession was only by permission of his companion, and as a consequence of such permission he received the rents and profits. But the bare perception of rents and profits is no ouster; and without an actual ouster, the Statute of Limitations is no bar against a tenant in common; and the cases cited were *Reading* against *Royston,* 2 Salk. 423, and 2 Ld. Raymond 830, and *Empson* against *Shackleton,* 5 Burr. 2,604.

For the defendants it was admitted, that where there is no ouster, the Statute of Limitations does not bar the other tenant in common. But here the jury have found an actual ouster; and the only question is, whether they were warranted in so doing. As to the case of *Empson* against *Shackleton,* no expulsion or ouster was found in that case; the single question was, whether the plaintiff was barred by the Statute of Limitations, after a possession of twenty-six years; and the Court held he was not. But Lord Mansfield there said, if a question had been made at the trial, whether the plaintiff was ousted, it might have been a fact to have been left to a jury. Here the question was made, and the circumstances left to the jury were sufficient, in point of law, for them to presume an actual ouster; namely, an uninterrupted possession and receipt of the rents and profits for forty years. The cases cited were 12 Mod. 658, 9. 1 Ld. Raymond 310.

Lord Mansfield.—It is very true that I told the jury, they were warranted by the length of time, in this case,

to presume an adverse possession, an ouster, by one of the tenants in common, of his companion; and I continue still of the same opinion. Some ambiguity seems to have arisen from the term *actual ouster*, as if it meant some act accompanied by real force, and as if a turning out by the shoulders were necessary. But that is not so. A man may come in by rightful possession, and yet hold over adversely without a title. If he does, such holding over, under circumstances, will be equivalent to an actual ouster. For instance, length of possession during a particular estate, as a term of one thousand years, or under a lease for lives, as long as the lives are in being, gives no title; but if tenant pur autre vie hold over for twenty years after the death of cestuy que vie, such holding over will, in ejectment, be a complete bar to the remainder man or reversioner; because it was adverse to his title,

So in the case of tenants in common; the possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion; because such possession is not adverse to the right of his companion, but in support of their common title; and by paying him his share, he acknowledges him co-tenant. Nor indeed is a refusal to pay of itself sufficient, without denying his title. But if, upon demand by the co-tenant of his moiety, the other denies to pay, and denies his title, saying he claims the whole, and will not pay, and continues in possession, such possession is adverse and ouster enough. The question then is, whether the possession in this case, after the death of Stevens, in the year 1734 that is, after the particular estate ended, was a possession

as tenant in common, *eo nomine*, or adverse? It is a possession of near forty years, which is more than quadruple the time given by the statute for tenants in common to bring their action of account, if they think proper; namely, six years: But in this case no evidence whatever appears of any account demanded, or of any payment of rents and profits; or of any claim by the lessors of the plaintiff; or of any acknowledgment of the title in them, or in those under whom they would now set up a right. Therefore I am clearly of opinion, as I was at the trial, that an undisturbed and quiet possession for such a length of time, is a sufficient ground for the jury to presume an actual ouster, and that they did right in so doing.

Aston, Justice.—There have been frequent disputes as to how far the possession of one tenant in common shall be said to be the possession of the other, and what acts of the one shall amount to an actual ouster of his companion. As to the first, I think it is only where the one holds possession as such, and receives the rents and profits on account of both. With respect to the second, if no actual ouster is proved, yet it may be inferred from circumstances, which circumstances are matter of evidence to be left to a jury. Now, in this case, there has been a sole and quiet possession for forty years, by one tenant in common only, without any demand or claim of any account by the other, and without any payment to him during that time. What is adverse possession or ouster, if the uninterrupted receipt of the rents and profits, without account, for near forty years, is not?

Willes, Justice.—This case must be determined upon its own circumstances. The possession is a possession of sixteen years above the twenty prescribed by the Statute of Limitations, without any claim, demand, or interruption whatsoever; and therefore, after a peaceable possession for such a length of time, I think it would be dangerous now to admit a claim to defeat such possession. However strict the notion of actual ouster may formerly have been, I think adverse possession is now evidence of actual ouster; and therefore entirely agree, that under the circumstances which appeared on the trial, it was very properly left to the jury to presume an actual ouster in this case.

Ashurst, J. was of the same opinion, and observed, that after so long an acquiescence, the jury were well warranted to presume any thing in favour of the defendant's title; and they might presume either an actual ouster, or a conveyance. With respect to the case of Fairclaim ex dem. *Empson* against *Shackleton*, the present question was not properly before the Court in that case. The single question there was, whether the plaintiff was barred by the Statute of Limitations. The possession was a possession of twenty-six years; but in that case it was left to the jury to presume either an adverse possession or actual ouster. And thought, that after a quiet uninterrupted possession for forty years, they were well warranted.

Receipt (*a*) for rent by a stranger is no evidence of possession, so as to take it out of him in whom the right is, for it is no disseisin without the admission of him

(*a*) Bul. N. P. 104.

who right has; not even though he make a lease to the tenant by indenture reserving rent, unless he make an actual entry: so, though the tenant declare he is in possession for the stranger; though it may be proper to be left to a jury, especially if the stranger have any colour of title. And though the plaintiff be out of possession, the statute only begins to operate from the time of a right to enter accruing.

Ejectment (*a*) for lands at Deptford, in Kent.—The lessor of the plaintiff claimed the estate, as heir at law of John Walthew and Edmund Walthew, who had granted long leases of the premises in question. John Walthew, together with Edmund Walthew (nephew to John), were seised in fee, as parceners in gavelkind of the lands in question; and, on 11th June 1678, leased the premises to John Hall for seventy-one years, at £6. 10*s*. rent; and on 22d April 1692, again leased the premises to Ann Hall, who had succeeded the original lessee, for forty years, to commence from 1749, at the same rent. The lease was traced down by several assignments to the 4th March 1742, when it was assigned by the then assignee of the lease, to one Robert Tew, from whom the ancestor of Mr. Maddox had obtained possession. These leases expired 11th June 1789, on which one Elizabeth Ellerbeck had entered, in the name of herself and the lessor of the plaintiff; and Mr. Maddox the defendant had brought an ejectment, claiming not only under the assignment of Tew, but also under a conveyance of the reversion by lease and release from the heirs of Dame Elizabeth Blundell, who, he stated, was the heir of John and Edmund

(*a*) Run. Appx. 453.

Walthew. Elizabeth Ellerbeck having no evidence, called no witnesses; and Maddox recovered the premises on a trial before Gould, J. at Maidstone, Lent 1791. Mrs. Ellerbeck, being thrown into gaol for the costs, died there, and the present lessor of the plaintiff, her sister, having obtained friends, made an entry, and brought the present ejectment, which came on to be tried before Hotham, B. at Maidstone, Lent assizes, 1794. The lessor of the plaintiff, having given evidence of the above leases, proved a descent by parish registers and Fleet marriages, from Elizabeth Walthew (of Kidbroke, a hamlet in Deptford parish); and by the baptism of the said Elizabeth it appeared she was daughter of Mr. Walthew; and it was shewn, that Henry Walthew, of Deptford, was eldest brother of John Walthew, and uncle of Edmund Walthew, the lessors of the two original leases; and that Henry Walthew, having lived at Deptford, was insisted to be the father of the said Elizabeth, of Kidbroke.

For defendant it was objected, that supposing the pedigree sufficiently proved, as there was a rent of £6. 10s. reserved on the two original leases, the lessor of the plaintiff must shew that she herself, or some of the several ancestors from whom she derived her title and descent from Elizabeth, of Kidbroke, had received that rent, within twenty years previous to the commencement of the action. And Hotham, B. thinking that was necessary to prove a possessory title, the rent being in lieu of the land, thought the objection was fatal, and upon it nonsuited the plaintiff.

Easter term, 1794, K. B. it was moved by Bond, Serjeant, to set aside the nonsuit. He said, it was a

general question, whether a person, seised of a reversion, expectant on a term for years, is bound, in order to entitle himself to recover in ejectment, to shew, as part of his case, that he has actually been possessed, within any particular limits, of the rents reserved upon the leases. He said, it would be admitted, if nothing was reserved, he could not be expected to shew any thing was received. But as fealty was at least the implied service in all tenancies, if no rent, the party must shew he had received fealty; or if a pepper-corn was only reserved, he must prove seisin of it. He said, nothing of this was to be found in the Statute of Limitations, which alone could have given birth to the supposed rule. That 21 Jac. 1. c. 16. s. 1. only directed that the entry must be made within twenty years after the title accrued. And as ejectment only lay where the title of entry was found, the ejectment only could be brought within twenty years. That here, the leases expired in June 1789, consequently the ejectment being brought within twenty years after the title accrued, the statute was satisfied. He concluded, that all reference or analogy to this statute was false, and there was no rule of law which authorized the defendant's objection. He said, if the rent had not been received, the same statute had taken away the remedy by action of debt, after six years, but not the right. The right remained to the rent; and according to Sir W. Foster, in 8 Co. 64. the older Statute of Limitations did not apply to rent reserved by deed. S. P. 2 Vern. 235. The proof of payment was not a requisite or direct point to be prepared to prove in this action; he don't undertake to make out he is entitled to the rent; he only is to shew he is entitled to the possession, the term being elapsed. In real actions, sometimes explees are part of demandant's

case, as in a writ of right; but in others, as in cessavit, or escheat, where they claim a seigniory, or reversion, none are alledged. Bro. Expl. 5. several special verdicts in ejectment may be looked at, where plaintiff's whole proof set out, not necessary to shew seisin of rent reserved, where reversioner claimed after a long lease rendering rent. Salk. 339. he said he was nonsuited. That probably on the whole case it might have appeared, that the plaintiffs were not entitled; and non-receipt of rent in that line of descent plaintiffs claimed, might operate as a consideration or presumption for the jury to go on, and lead them to suppose the right was not in the plaintiffs; but if defendant had shewn this, the plaintiffs might have rebutted such a presumption, by evidence in reply; and that, at all events, not receiving the rent was only a question for the jury, and could not warrant a nonsuit; as if it was as necessary a requisite as proof of a conversion in trover, or of explees in a writ of right.

The Court set aside the nonsuit; Lord Kenyon going very much on Bond's argument.

The cause was tried before Lord Kenyon, Sum. 1794, when defendants had a verdict, on the defect of plaintiff's pedigree, and a fair conclusion, from all the circumstances, that Dame Elizabeth Blundell, under whom Maddox claimed, was heir of the Walthews, and not Elizabeth, of Kidbroke.

Nor does it bring the case within the statute, that the lease contained a covenant for re-entry for non-payment of rent, as the lessor was not obliged to enter for condition

broken: or that the premises were copyhold, and the defendant had been admitted as heir at law to his father, who had been admitted as heir at law to him last seised, and had received the rent during the continuance of the original lease; for as a descent cast only tolls an entry where an entry can lawfully be made, so the statute only bars an entry where such entry was lawful; and to avoid the statute, the law will not require a man to be a trespasser.

In ejectment (*a*) for a house and premises, a verdict was found for the plaintiff, subject to the opinion of the Court on a special case; in which it appeared, that the premises in question were parcel of the manor of Stebunheath, otherwise Stepney, in Middlesex. At a court holden for the manor, on the 12th April 1743, Thomazine Taylor, spinster, was admitted to the premises, by the description of, &c. &c. according, &c. At the same court, the said Thomazine Taylor, according to the custom of the manor, surrendered, amongst others, the premises in question, to such uses, intents, and purposes, as the said Thomazine Taylor, in or by her last will or testament in writing, should limit, appoint, or declare. Thomazine Taylor, by indenture of lease of the 7th of June 1759, by virtue of a previous licence from the lord, demised the premises in question to Dorothy Whiting, since deceased, for forty-one years from Midsummer-day then next, at the rent of eight pounds per annum, payable quarterly on the usual rent days; with a proviso, that if the rent should be unpaid for twenty-one days, &c. or if all defects of reparations from time to time, &c. were not amended within three months next after notice in

(*a*) 7 East. 299.

writing, &c. or if the said Dorothy Whiting, her executors, &c. did not well and truly keep all the covenants, &c. on her and their parts, &c. that then and from thenceforth, and at all times afterwards, it should and might be lawful for the said Thomazine Taylor, her heirs, &c. into and upon the said demised premises to re-enter, and repossess. The lessee took possession of the premises under this lease; and she and her representative, Mr. John Scott Whiting, (the present tenant in possession), continued to occupy them from the commencement of the lease until the expiration of it at Midsummer 1800. On the 3d of August 1780, Miss Thomazine Taylor, the lessor, gave directions to her attorney to prepare her will; by which she gave to certain persons the premises in question, in trust for Elizabeth Cook (who was therein named Mary Cook), and her heirs for ever; but the jury found that the lessor of the plaintiff was the person intended by that description. Before any will was made under these instructions, Miss Thomazine Taylor died. These instructions were, upon the 25th of February 1782, pronounced for and established as the only will of Miss Thomazine Taylor, by the Prerogative Court, and probate thereof was afterward granted accordingly. Upon the 21st June 1782, Thomas Danvers, father to the present defendant, was admitted as heir at law to the premises in question, in the accustomed form.

The rent was paid to Thomas Danvers from the time of Miss Thomazine Taylor's death, until his own death in January 1791; and from that time till the expiration of the lease, to his son James Danvers, the defendant, who, upon his father's death, was admitted, 3d May 1791, to the premises as his heir at law, in the same f...m

as his father was admitted. And, upon the expiration of the lease, made a new devise to Mrs. Whiting, under which the latter held, and paid rent as tenant to the defendant, at the time of the demises laid in the declaration. The lessor of the plaintiff Elizabeth was admitted to the premises upon the 1st of December 1801. Her marriage with the other lessor was proved at the trial: and it was also proved that the testatrix had no other relative of the name of Cook, except the lessor of the plaintiff Elizabeth, and that she was the person who was intended to take by the name of Mary Cook, as described in the instructions of the 3d of August 1780. The question for the opinion of the Court was, whether the lessors of the plaintiff were, under the above circumstances, entitled to recover.

The lessor of the plaintiff, Elizabeth Cook, claimed the premises in question under the will of Thomazine Taylor, by the description of copyhold; to which premises Thomazine had been before admitted, by the description of all that customary tenement, habendum to her and her heirs, tenendum of the lord by the rod, according to the custom, &c. and had before surrendered by the description of customary lands, &c. holden by copy of court-roll, to such uses as she, by her last will and testament in writing, should appoint. But though the testatrix died in August 1780, and the will was established in February 1782, yet, owing to an outstanding lease granted by the testatrix in her life time, which did not expire till June 1800, the devisee did not enter, or bring ejectment, till Hilary Term 1802, but suffered the heir at law of the testatrix, who was admitted to the premises in 1782, and afterwards the defendant, his son,

to whom they descended in 1791, to take the rent during the intermediate time; and this although there was a proviso in the lease for re-entry, in case of non-payment of rent.

Upon these facts four objections were taken; the first and second were on the construction of the Statute of Frauds; the third was, that the lessor's right of entry was either tolled by the descent cast on the defendant, or, fourthly, it was barred by the Statute of Limitations; and that either, first, by the non-receipt of rent under the lease granted by the testatrix for more than twenty years since her death; and the defendant and his father having, during all that time, had an adverse enjoyment of such rent, and of the premises: or, secondly, by the lesser Elizabeth not having availed herself for more than twenty years of her right of entry under the proviso in the lease for non-payment of rent, or otherwise.

It was argued for the defendant, that considering the estate as copyhold, the admittance "was the investiture of the tenant, and no attornment is necessary;" and a copyholder having a right or title to admittance, which vests in him the whole seisin, is barred if he do not claim to be admitted within twenty years. Here, however, it was the stronger, because the defendant and his father, heirs at law of the testatrix, had an adverse possession, by admission, and by the receipt of the rents and profits for above twenty years since the lessor's title accrued. For an heir is in by descent, and may bring ejectment before admittance, though a devisee or surrenderee cannot; and on admittance upon descent, the heir is tenant immediately from the death of his ancestor.

2dly. Taking the premises to be freehold, the lessor of the plaintiff was also barred by his laches; and it was no answer to say, that the outstanding lease, which continued to run till Midsummer 1800, prevented his entry before; for it was still competent in him to have entered, without committing a trespass; as to demand rent, or fealty, or to obtain seisin of the freehold. [Mr. Justice Laurence.—Must not an entry, to avoid the Statute of Limitations, be an entry for the purpose of taking possession? and how could the lessor have lawfully entered for that purpose during the continuance of the lease?] If this were so, a right of entry might be preserved even *after* an ouster of the rents and profits, for above sixty or a thousand years; which would entirely defeat the object of the statute, which was to quiet men's possessions: and it would be incongruous to hold, that an ejectment might be maintained after a real action was barred by length of time; and that such an effect should be produced by a tenancy from year to year, or even a tenancy at will.

*Taylor* against *Horde* (*a*) was cited, to prove that a tenant in possession enjoys as the covenanted bailiff of the tenant of the freehold: and as a recovery of a term does not displace the freehold, so, according to Co. Lit. s. 411. there may be a disseisin of the freehold, pending a term, which shall be no ouster of a term. But *Taylor* against *Horde* shews, that a mere entry on the land for another purpose, does not operate as a disseisin of the tenant in possession, so as to make a good tenant to the præcipe.

(*a*) 1 Burr. 115.

[Lord Ellenborough, Ch. J.—Disseisin is said to be a personal trespass, a tortious ouster of the seisin of another. And in Salk. 246. Lord Holt says, there can be no disseisin without an actual expulsion. But can you shew that the devisee could have entered to vest the seisin in herself, without committing a trespass upon the tenant in possession? because the law does not require a person to do that which would make him a wrong doer.]

She might have had a writ of entry during the continuance of the lease, for the purpose of asserting and establishing her right.

Ouster of seisin is distinct from ouster of possession. Receipt of rent by a stranger is *a disseisin* (*a*); and yet there is no ouster of possession. And, at any rate, there might have been a symbolical delivery of customary lands in lease by admittance, subject to the lease. Besides, the devisee might have brought a real action, wherein the judgment is *ut haberet seisinam*, &c. without saying any thing of the possession: and there the demandant counts upon his seisin, and not upon possession, as in ejectment. And if the fact of the lands being in lease do not bar the seisin of the owner, there is no reason why it should bar his entry for the purpose of giving him seisin.

The devisee might have justified in trespass brought by the tenant, that she entered in order to visit the seisin in herself, or to assert her right, whatever it might be, against the party claiming and taking the rent, and not to

(*a*) At the election of the party. Cro. Car. 303.

oust the tenant. She might also have entered to distrain for the rent. And, at all events, as there was a clause in the lease for re-entry in default of payment of the rent, the devisee might have availed herself of the forfeiture to enter and keep possession above twenty years ago.

The Statute of Limitations has always been construed favourably with a view to quiet possession. And the question, whether the receipt of rent by one tenant in common for above twenty years, were an ouster of his companion, could never have occurred, if an adverse receipt of rent for such a length of time, had not been considered as a bar.

Now here the defendant, and his father before him, have had an adverse possession by the receipt of the rent for above twenty years, which is not only a bar to the lessor's remedy, by ejectment, but gives the defendant a title to the possession, from whence he can only be removed by a real action: And that this distinguished the case from *Orrel* against *Maddox*, Runing. Eject. 458. where the only question was, whether it was necessary for the lessor of the plaintiff, to shew a receipt of rent within twenty years, on an oustanding lease, which was holden not to be necessary.

For the plaintiff it was answered, that a descendant could only toll an entry where an entry might lawfully have been made; but the devisee had no right of entry pending the lease granted by testatrix, which did not expire till 1800; and the law will never compel a person to be guilty of a trespass in order to acquire a right. No other right

or title of entry is within the Statute of Limitations, except that which is accompanied by a right of possession, which the lessor could not have pending the lease. And the payment of the rent during part of the time to the defendant and his father, would not, of itself, make the holding of the tenant wrongful, but it still continued legal under the original term, as the lessor was not bound to take advantage of the forfeiture, and re-enter for the condition broken. Besides, the devisee claiming under the will, was not bound to enter till the will was established, which was not till 1782, between which time and the bringing of the ejectment, there was not an adverse possession of twenty years.

Lord Ellenborough, Ch. J. afterwards, in delivering the opinion of the Court, observed, that much ingenuity had been exercised upon questions about which the Court had no doubt: amongst which was the fourth, as to whether the lessor of the plaintiff's right of entry were not barred by the Statute of Limitations; there having been an adverse enjoyment of the rent for a longer time than twenty years. And supposing the circumstances of the estate having been during all that time enjoyed by a tenant under a lease granted by the testatrix, and which expired only in 1800; the defendant in that case contended, that by not paying rent the tenant had committed a forfeiture more than twenty years ago, which gave the lessor of the plaintiff a right to enter; and not having done so within twenty years, she was on that account also barred. To these several objections, his Lordship observed, that it would not be necessary to go into them at any length, as satisfactory answers had been given in the several arguments. The

objections do not apply to cases where the party has no remedy but by entry. The estate having been in the hands of a tenant till 1800, holding under a lease granted by the testatrix, is a sufficient answer; for during that lease the lessor could not enter to support an ejectment: and if a forfeiture had been committed, she was not obliged to enter for the forfeiture.

We have seen that the statute does not run, but where there is an adverse possession; and that if the owner have a possession either in fact, or in contemplation of law, or if he be out of possession, and have no right to enter during a particular estate, but for condition broken, of which, in law, he was not bound to avail himself; in this case it never attaches. There are also other circumstances which prevent its operation; and also, certain acts of the party to be benefited by the statute, which, after it has begun to run, sets all at large again.

As to what prevents the operation of the statute, it has been holden, that the payment of interest on a mortgage will prevent the statute from running against the mortgagee, although he may not have been in possession of the lands for more than twenty years.

William Denne (*a*), possessed of a term for a thousand years, assigned to Ralph Philpot for a collateral security against a bond in which Philpot was bound jointly with Denne for the debt of Denne, in 1655. Philpot died, leaving R. Philpot, his son, his executor. William Denne died, leaving Katharine Denne, his wife, his

(*a*) Ld. Raym. 740.

executrix, and Katharine Denne, his daughter, his heir. In 1674, R. Philpot, executor of Ralph Philpot, and Katharine Denne, the executrix of William Denne, and Katharine Denne, the heiress of William Denne, assigned this term of a thousand years to John Harrison, with condition that, upon payment of £200. the consideration of the said assignment, by Katharine Denne, the executrix, &c. Katharine Denne received the profits till 1691, and she paid the interest to the same time. And per Holt, Ch. J. If a man makes a mortgage for collateral security, although the mortgagee is not in possession for twenty years and more, yet, if the interest be paid upon the bond, according to the agreement of the parties, it shall not be barred by the Statute of Limitations.

Which, with the preceding cases cited, establishes this construction; that where the act of the defendant acknowledges a right in the owner, the statute will not operate; because such acknowledgment, deduced from circumstances, negatives the idea of adverse possession.

So, where the tenant for more than twenty years, and after the expiration of a lease, remains in possession, and omits to pay the rent, but allows the lessor to receive tithes, according to a covenant contained in the lease; such allowance, whilst it continues, is an acknowledgment of the lessor's right, and prevents the operation of the statute.

In ejectment (*a*) for lands in the parish of Beddington. The lessors of the plaintiff, who were lords of the manor of Beddington, sought to recover these lands, as parcel of

(*a*) 2 Bos. & Pul. 541.

the manor; and the defendant, who was rector of the parish of Beddington, disputed their title, claiming them as parcel of the rectorial glebe. The lords of the manor of Beddington had the right of presentation to the rectory, and were also entitled to a portion of the tithes. At various times, there had been a mutual interchange of lands and tithes between the lords of the manor and the rectors, which had given rise to much confusion concerning their respective rights. To prove possession in the lessors of the plaintiff a deed was produced, dated on the 18th of November 1703, by which the then lords of the manor demised to one Richard Reddall, parson of Beddington, the lands in question (among others) for forty years, " yielding and paying therefore yearly during the said term, the sum of forty-three shillings and four-pence; and also paying and delivering yearly during the said term, at the barn door, in the yard of the mansion-house, all the tithe-straw, both of wheat and rye, coming and growing within the parish of Beddington, and also seven quarters of wheat, four quarters of rye, and thirty quarters of barley. The deed then went on, " and the said Richard Reddall, for himself, his executors, &c. doth covenant, promise, and grant, to and with the said Sir I. I. &c. (the lords of the manor), their heirs, &c. that he the said Richard Reddall shall not only well and truly pay, or cause to be paid, from time to time, and at all times during the continuance of this present demise, unto the said Sir L. I. &c. their heirs, &c. the said yearly rent of forty-three shillings and four-pence at the said mansion-house, but also shall and will deliver the said tithe-straw, together with the said wheat, rye, and barley, in such manner and form as the same shall grow due and payable by virtue of these presents; and further, the said

Richard Reddall doth grant unto the said Sir I. I. &c. their heirs, &c. that they shall have and enjoy all the tithe oats hereafter to be arising or growing within the said parish of Beddington, to be yearly taken by the said Sir I. I. &c. their heirs, &c. during the said term (except the tithes of the glebe lands and portionary hereby demised, while it is in the said parson's own occupation); provided always, that if the said yearly rent of forty-three shillings and four-pence, or any part thereof, shall be behind and unpaid by the space of one and twenty days next after any of the said feast-days on which the same ought to be paid as aforesaid, being lawfully demanded, or if the said corn or straw above-mentioned be not well and truly delivered in manner and form aforesaid, within fourteen days next after request thereof made as aforesaid, or if the said Sir I. I. &c. their heirs, &c. shall be molested or troubled by the said Richard Reddall, or his assigns, in taking or enjoying the said tithe oats by these presents mentioned to be granted as aforesaid, that then and from thenceforth it shall and may be lawful for the said Sir I. I. &c. their heirs, &c. into the said demised premises, with all and singular their appurtenances, to re-enter, and the same to have again as in their former estate." At the conclusion of the deed there was a covenant by the lords of the manor, that "the said Richard Reddall and his assigns shall quietly and peaceably enjoy the said demised premises, paying the yearly rent, and under the covenants, grants, and agreements, before in these presents contained, without any lawful let or interruption of them the said Sir I. I. their heirs, &c. during the said term."

To rebut this evidence, and shew an adverse possession, the defendant read an answer to a bill in equity, of a late date, filed by himself against the lessors of the plaintiff, for an account of the tithe of oats which he then claimed, in which, though they did not mention the deed of 1703, yet they referred to a similar lease, of a much older date, and stated, that such leases had from time to time been granted to the rectors by the lords of the manor; and that about 1753, upon some dispute between Sir N. H. Carew, the then lord of the manor, and the Reverend John Pryse, then incumbent of the living of Beddington, the latter taking advantage of the former being a man of an indolent temper, and inattention to business, withheld the rents reserved on the lands in question, but permitted him to continue to take the tithe of oats. Upon the above part of the answer being read in evidence by the defendant, the counsel for the plaintiff also read the following sentence from the same answer: "That the lessors of the plaintiff had heard as truth, that the said John Pryse did pay or deliver to the said Sir N. H. Carew divers quantities of corn and straw; and that the said Sir N. H. Carew did receive the tithe of oats within the said parish;" which corn and straw, he insisted, was delivered by way of render, and the tithe of oats received in consideration of the demise, and on the footing of the several agreements contained in the several leases. No rent appeared to have been paid by the rectors of Beddington to the lords of the manor since the year 1753; but the latter continued to take the tithe of oats until a decree made in favour of the rector, in consequence of the above mentioned bill in equity. The present defendant was instituted to the living of Beddington in the year 1782; and

it was not till after that period that the lease of 1703, which had been lost, was discovered.

Lord Alvanley, Ch. J. If the rules of law will permit me to do otherwise, I shall be very sorry to give any countenance to the defence which has been resorted to in the present case. And the more so, because the two parties, in ascertaining their respective rights, meet upon very unequal terms; the one, as the representative of the Church, being barred by no lapse of time in the claim of any dormant rights, whereas the other has to encounter the difficulties opposed to him by the Statute of Limitations. It is not disputed that the premises in question were demised to the rectors of Beddington by the predecessors of the present lessors of the plaintiffs, reserving to themselves certain rents, and also the tithe of oats within the parish. Since the year 1753, the rectors have ceased to pay the rents reserved in the lease, but the Carew family have continued to receive the tithe. Possibly, therefore, at the time at which the rents were withheld, it was agreed between the then rector and the representative of the Carew family, that if the latter were permitted to receive the tithe as before, the former should be permitted to retain the land demised. Considering, therefore, that this is a question to be submitted to a jury, and understanding from the learned Judge who tried the cause, that whatever was contested at the trial was submitted by him to the jury, I am of opinion that the present verdict ought not to be disturbed.

Heath, J. The doctrine of remitter furnishes a strong analogy in favor of the present lessors of the plaintiffs;

for the rule is, that a man who is in by a puisné estate, shall be remitted without any act of his own, but by a mere operation of law in his eigné estate. Now that rule seems to me very applicable to the present case; for it is clear that the Carew family continued to receive the tithe of oats, and therefore should, as it appears to me, be held to have received them in that right which they acquired under the demise by which they granted the premises in question. Besides, it is to be recollected, that this question arises upon the Statute of Limitations, which always receives a strict construction from the Courts.

Rooke, J. It is clear that the Carew family and the rectors of Beddington agreed to create the relation of landlord and tenant between themselves by the lease of 1703; and up to the present time, the one has continued to receive the tithe, and the other to hold the land. The present rector attempts to avail himself of a rule of law highly favourable to the Church, by which he may, without any limitation of time, reclaim the tithe granted as a consideration for the enjoyment of the land in question by his predecessor, and yet prevent the Carew family from reclaiming their land by setting up the Statute of Limitations in bar of their demand. This is so unjust, that I shall be glad to find out any ground upon which we may be enabled to defeat his attempt. Now it does appear to me, that the former rectors of the parish may be presumed to have intended to do justice, and therefore to have permitted the Carew family to receive the tithe of oats by way of compensation for the land which they continued to hold. If so, the present rector not having succeeded to the living till 1782, the possession of the premises in question was not adverse up to that period, and since that

period twenty years have not elapsed. Upon the whole, therefore, I think there ought not to be a new trial.

Chambre, J. Upon this question I have entertained considerable doubts; nor, indeed, is my mind altogether free from doubts at the present moment. Those doubts do not respect the justice of the case, for that is most clearly with the lessors of the plaintiff. I am not, indeed, altogether without suspicion, that the contract entered into between the rectors of Beddington and the Carew family originated in simony; the latter reserving to themselves much more than they were entitled to, under the name of a compensation for the manor-house and lands. But however that may be, it will not affect the present question. If this case were to be again submitted to a jury, I think they might fairly conclude, that in 1753, the then rector of Beddington quarrelled with the terms of his lease, and though he refused to continue the stipulated renders to the Carew family, yet permitted them to receive the tithe of oats. Possibly, at the trial, the question was not put to the jury quite so fully as it might have been, but reserved rather too much as a dry point of law. Indeed, could I be convinced that the jury had considered and decided the precise question, my doubts would be removed. Certainly, in the litigation of their respective rights, these parties contend on very unequal terms; the rector availing himself of a maxim in law in favour of the Church, to which the Carew family, as laymen, cannot resort. The point, however, which, in this case, has most embarrassed my mind, is the degree of positive truth drawn from the answer in Chancery of the lessors of the plaintiff in their own favour. It is true that it was introduced into the cause by the defendant, on

whose behalf some parts of the answer were read. But in those parts on which the lessors of the plaintiff relied, they speak only to what they "have heard as truth." I think that was not admissible evidence; for it appears to me, that where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to wave any objection to the competency of the testimony of the party making the answer; and that he does not thereby admit as evidence all the facts which may happen to have been stated by way of hearsay only, in the course of the answer to a bill filed for a discovery. This point does not, indeed, appear to have been contested at the trial. Had it been contested, I should have thought the Court bound to send the case down to a new trial. Upon the whole, however, I am disposed to concur with my Lord, and my brothers, that there ought not to be a new trial this case.

As to what act of the party to be benefited by the statute takes the case out of the statute. It was ruled per Holt, Ch. J. at Maidstone, Lent assizes, 13 Wil. 3. in an ejectment (*a*) brought by the executor of Harrison, that he was not barred by the Statute of Limitations, because the statute did not prejudice at the time of the assignment, there being but nineteen years elapsed; and then the joining of him in the assignment, who had the title to take advantage of the statute, gives a new title.

Also, it has been ruled (*b*), that a claim or entry, to prevent the Statute of Limitations, must be upon the land, unless there be some special reason to the contrary.

(*a*) Ld. Raym. 740. (*b*) 6 Mod. 44. Doug. 435. Bul. N. P. 102.

And by the 4 & 5 Anne, c. 16. upon such claim or entry, an action must be commenced within one year next after the making of such entry and claim, and prosecuted with effect, otherwise of no force to avoid the statute.

## CHAP. III.

### *Of the Proviso contained in the second Section.*

THIS Statute provides (*a*), that if any person entitled to a Writ of Formedon, or having a right to enter, be, at the time of such right or title first descended, within age, feme covert, non compos mentis, imprisoned, or beyond the seas, such person and his heirs may, notwithstanding the twenty years be expired, bring his action, or make his entry, as he might before, so that he sue forth the same within ten years after the disability removed, or the death of him having the right.

It is to be observed, that the Statute of Limitations only runs in bar of the action or right therein mentioned; but if the plaintiff have a right of a higher nature, if he can maintain a Writ of Right for the same lands into which he could have entered but for the statute, he may do so notwithstanding; so that he prosecute such right within (*b*) sixty years of the seisin of his ancestor: for a bar (*c*) is of the particular action, or of any of the same nature or degree only, and not of any action of a higher nature; which makes this difference between the Statute of Limitations and the Statute of Fines; under the latter, a fine duly levied, and non-claim, bars every right; but the former, in many cases, bars only a specific remedy.

(*a*) 2d section. (*b*) 32 H. 8. (*c*) Co. Lit. [illegible]

When the statute begins to run, no subsequent disability stops it; therefore, if the person, at the time of the accruing of the right, could have made his entry, or brought his action; though he should be immediately after imprisoned; or if, when the right accrued, he were under any disability, which was removed, and shortly he should fall under some other, the right of action or entry is not saved to him.

In *Doe*(*a*) on the demise of *Count Duroure* against *Jones*, it appeared on the special verdict, that in Trinity Term 1775, a fine sur conusance de droit come ceo, &c. was levied of lands between C. Langlois, plaintiff, and the defendant deforciant; and the last proclamation of that fine was in Easter Term 1776. The lessor of the plaintiff, when the fine was levied and proclaimed, was an infant, but attained the age of twenty-one on the 26th of February 1784: he was then at large in England, and continued so to be until the 17th of December 1784, when he was arrested, and imprisoned for debt; and was kept and detained in prison continually from that time until the 16th of September 1789; and on the 17th day of that month, he, claiming title to the premises in question, made an actual and personal entry thereon, in due form of law to avoid the fine, and ejected the defendant, &c.

In argument for the plaintiff, a passage was cited from Shep. Touch. 30. from whence it should seem that the party is not bound by the fine, unless he have five entire years to make his claim free from any of the disabilities mentioned in the act, except where such disability is incurred by his own voluntary act; for, speaking of

(*a*) 4 T. R. 301.

absence out of England, it says, that if a party be in England at the time of the fine levied, and after go beyond seas, and suffer the five years after the proclamation to pass, in this case he shall have no longer time, except he be sent in the king's service, and by his commandment; which, it was argued, seems to mark a distinction between voluntary and involuntary disabilities; and supposes, that in the latter instance, the fine would not continue to run, although the party was in England when it first began to have its operation. Now imprisonment must be considered as equally involuntary with the case there put; and is so considered in Plowden 366. where it is said, that taking husband, or going beyond the seas, are voluntary acts; but insanity of mind and imprisonment are against the will of the party: then, what ought to be the construction of the Court so as best to answer the intention of the legislature? In introducing those exceptions, they certainly intended that the parties labouring under the disabilities mentioned, should have the full benefit of the indulgence given them. Every reason which operated for the exception in the first instance, is equally urgent as to any subsequent disability. This act was intended to allow all such persons five years clear from any of the disabilities mentioned: the words imply as much; and as the act was restrictive of the right which such persons had before, it ought to be construed literally and strictly.

Lord Kenyon, Ch. J. The two questions which have been raised in this case are certainly of great importance; though, in my opinion, of no difficulty. It is of importance that it should be known who are deemed natural-born subjects, on account of the various rights to which

they are entitled. It is also important to know how far the operation of the Statute of Fines extends, not only as it affects questions arising on that particular act, but, also, as it involves in it questions arising on a very beneficial system of statutes, the Statutes of Limitations: for if we were to suffer any innovation on the established construction of fines, it might also endanger the uniform construction of the other Statutes of Limitations, which are of the greatest importance, inasmuch as they are statutes of repose. But from the time when I first read this case, down to the present moment, I have not seen any fair reason to doubt on either of these points.

His Lordship having disposed of the first question, continued;—But on the other question, which is of infinitely greater importance, inasmuch as it respects an infinitely greater number of cases, it is not fit that we should be silent, lest our silence should be deemed an acquiescence in the plaintiff's argument. I confess, I never heard it doubted till the discussion of this case, whether, when any of the Statutes of Limitations had begun to run, a subsequent disability would stop their running. If the disability would have such an operation on the construction of one of those statutes, it would also on the others. I am very clearly of opinion, on the words of the Statute of Fines, on the uniform construction of all the Statutes of Limitations down to the present moment, and on the general received opinion of the profession on the subject, that this question ought not now to be disturbed. It would be mischievous to refine, and make nice distinctions between the cases of voluntary and involuntary disabilities; but in both cases, when the disability is once removed, the time begins to run.

Ashurst, J. I also concur with my Lord. Our decision is warranted by the uniform construction which has been put upon this statute; and a contrary determination would be productive of all those mischievous consequences which the different Statutes of Limitations intended to prevent. If the disability be once removed, the time must continue to run, notwithstanding any subsequent disability, either voluntary or involuntary; and even if there were any distinction between the two kinds of disability, the present is against the plaintiff; for the imprisonment for debt was in consequence of his own voluntary act.

Grose, J. agreed.

Mr. Justice Buller was sitting for the Lord Chancellor.

In *Doe* on the demise of (*a*) *Griggs and another* v. *Shane*, at the trial before Gould, J. the defendant set up a fine in order to bar the plaintiff's title. It appeared in evidence, that the person under whom the lessors of the plaintiff claimed, and to bar whom the fine was set up, was of sane mind when the fine was levied, but that he became insane about two years afterwards; and the question was, whether the time continued to run against him while he was in that state? for, if it did not, the lessors of the plaintiff had made their entry in time. A verdict was taken for the plaintiff, with liberty to the defendant to move to enter a nonsuit, in case the Court should be of opinion that the party was barred. Erskine was to have shewn cause against the rule for entering the nonsuit; but he said, that the current of authorities, on looking into them, was so strong against him, that he

(*a*) 4 T. R. 306 7.

would not pretend to argue the question. That though Brown and Saunders had said, in Plowd. 366. that in such a case the fine would not run, yet that all the authorities were the other way; and so was the determination even in that case in Plowd. The Court said he was right in giving up the point, for that it was too plain to be disputed; and they made the rule absolute.

But if a man both of non-sane memory, and out of the kingdom, comes into the kingdom, and then goes out of the kingdom, his non-sane memory continuing, it was said by Hardwicke, Lord Chan. (*a*) that his privilege, as to being out of the kingdom, is gone; and his privilege, as to non-sane, will begin from the time he returns to his senses.

The word "death," in this section, refers to the death of the person to whom the right first accrued; therefore, where ancestor died seised, leaving a son and daughter infants, and a stranger entered, and the son went to sea, and was supposed to have died abroad, the daughter was not allowed twenty years to enter from the death of her brother, but only ten.

Ejectment (*b*) for a house and a small parcel of land, tried before Rooke, J. at the Summer assizes, 1805, at Northampton; and the principal question was, whether the action was brought in time within the second clause of exceptions in the Statute of Limitations, 21 Jac. 1. c. 16.? The person last seised of the premises, from whom the lessors of the plaintiff claimed, was one Thomas Jesson, on whose death in the year 1777, David, his

(*a*) 2 Atk. 632. (*b*) 6 East. 80.

elder brother, took possession of them, and transmitted the possession to the defendant, his grandson. Thomas Jesson left a son John, and a daughter Frances, him surviving. John was baptized in 1767; and after the death of his father, being then about ten years of age, was put out apprentice to the sea service by the parish, and was seen by a witness on his return from his first voyage, about a year after the father's death: soon after which he went to sea again, and had not been heard of since, and was believed to be dead. Frances, the daughter, one of the lessors of the plaintiff, was baptized on the 21st of May 1771, and afterwards married George, the other lessor.

It was contended at the trial, by the defendant's counsel, that the ejectment was out of time; for it was uncertain when John, the son of Thomas, the ancestor last seised, died; and that the twenty years given by the statute began to run immediately on the death of Thomas in 1777, and consequently expired in 1797; or that, if the statute favoured Frances the daughter till ten years after the disability of her infancy was removed, at any rate, as she was of full age in 1792, she ought to have brought her ejectment in 1802; and consequently this ejectment, brought in 1804, was too late.

On the other hand, it was contended by the plaintiff's counsel, that supposing John to have died abroad, the presumption of his death could not arise till seven years after he was last seen in England previous to his going to sea, which could not be till 1785 or 1786, till when the right of entry of the lessor Frances did not accrue; and that she had twenty years in which to bring her ejectment

after that time; the statute having never begun to run by reason of the continuing disability, and consequently that this action was well brought.

The learned Judge left it to the jury to say when and where John died; and observed, that it was fair to presume he had not died in England, as none of his family ever heard of his death. And as to the time, that it was incumbent on the jury to find the fact as well as they could under the doubt and difficulty of the case; that, at any time beyond the first seven years, they might fairly presume him dead; but the not hearing of him within that period was hardly sufficient to afford such a presumption. The jury found a verdict for the plaintiff, and that John died abroad about the years 1785, 1786, or 1787, but not before.

In Michaelmas Term, 45 Geo. 3. it was moved to set aside the verdict, and grant a new trial, on the ground that Frances, the daughter, was at most entitled to ten years for bringing her ejectment after she came of age, which was in 1792, even if she were not bound to have made her entry within ten years from the death of her brother, from whom she claimed.

In shewing cause it was urged, the title of the lessor of the plaintiff, Frances, did not accrue until the death of her brother, which the jury found was not before 1785; and the first clause of the Statute of Limitations gives every person twenty years to make their entry after their title first accrued. The second clause was evidently intended to extend, and not to limit, the time of entry allowed by the first; because, in the particular cases, it

allows ten years, notwithstanding the said twenty years be expired. The meaning, therefore, was to allow every person at least twenty years after their title accrued, if there were a continuing disability from the death of the ancestor last seised, and ten years more to the heir of the person dying under a disability; which ten years are in addition to the twenty years allowed by the first clause. Where, indeed, the bar once begins to run, it may be presumed, in analogy to the decision on the Statute of Fines, 4 H. 7. c. 24. settled in *Doe* d. *Duroure* v. *Jones* (*a*), that no subsequent disability will stop it: but here the disability continued from the death of the person last seised until after the lessor's title accrued, and the time never began to run during the brother's life-time. another view of the case, a difficulty was imposed upon the jury without necessity, in requiring them to find the exact period of the death of the brother of the lessor, which they could not properly do without evidence. It would have been sufficient for them to have found that he continued abroad till his death, and that he died within ten years before the ejectment brought. And if there were sufficient evidence before them to have raised that presumption, the Court will not send the cause to a new trial, when the same verdict ought to be found.

The Court did not hear counsel in support of the rule; but thought at any rate there must be a new trial.

Lord Ellenborough, Ch. J. The time allowed by the statute for making an entry might be indefinitely extended, if the construction contended for by the plaintiff were to be admitted. There is no calculating how far it

(*a*) Ante. 60.

might be carried by parents and children dying under age, or continuing under other disabilities in succession. The brother, John, through whom the lessor of the plaintiff, Frances, claims, being under the disability of nonage at the time of the father's death, when his title first accrued, and dying under that disability, it appears to me that the proviso in the second clause of the statute (where resort is to be had to it to extend the period for making an entry beyond the twenty years), required the lessor Frances, as heir to her brother, to make her entry within ten years after his death; and that not having done so, this ejectment was brought too late. The word *death* in that clause must mean and refer to the death of the person to whom the right first accrued, and whose heir the claimant is: and the statute meant that the heir of every person, to which person a right of entry had accrued during any of the disabilities there stated, should have ten years from the death of his ancestor, to whom the right first accrued during the period of disability, and who died under such disability (notwithstanding the twenty years from the first accruing of the title to the ancestor should have before expired). As to the period when the brother might be supposed to have died, according to the statute 19 Car. 2. c. 6. with respect to leases dependent on lives, and also according to the Statute of Bigamy (1 Jac. 1. c. 11), the presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living. Therefore, in the absence of all other evidence to shew that he was living at a later period, there was fair ground for the jury to presume that he was dead at the end of seven years from the time when he went to sea

on his second voyage, which seems to be the last account of him. That was about the year 1778, which would carry his death to about 1785.

Laurence, J. Upon the death of the father Thomas Jesson, in 1777, the right descended to John, the son, then under age, who died under that disability. The lessor Frances is the heir of John; and the statute gives to the party to whom a right of entry accrues, and who is under a disability at the time, ten years after the disability removed, notwithstanding the twenty years should have elapsed after his title first accrued; and to his heir the statute gives ten years after the death of such party dying under the disability. Here more than ten years had elapsed after the death of the brother before this ejectment was brought. It appears probable enough, upon looking into the case of *Stawell* v. *Lord Zouch* (*a*), that the word *death* was introduced into the statute of James in order to obviate the difficulty which had arisen in that case upon the construction of the Statute of Fines, 4 H. 7. c. 24. for want of that word.

Grose and Le Blanc, Js. assenting, the rule was made absolute.

(*a*) Plowd. 358.

## CHAP. IV.

### *Of Actions on Contracts.----Exception concerning Merchants.*

Such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, are excepted out of that clause, which enacts, that all actions of account, and upon the case, shall be commenced and sued within six years next after the cause of such action. This exception may be considered with respect to the parties, and the nature of the accounts. With respect to the parties, the exception extends to all merchants, as well inland, as to those trading beyond sea, though this has been doubted (*a*). And it has also been extended to other tradesmen, and persons having mutual dealings; though, formerly it was thought, that no sort of tradesmen, but (*b*) merchants, were within the benefit of the exception; and that it did not extend to shopkeepers, they not being within the same mischiefs, In *Cotes* v. *Harris* (*c*) it was held, that the exception extended to cases where there were mutual accounts and reciprocal demands between two persons; but not in the case of a tradesman and his customer, the items of credit being all on one side. In *Cranch* v. *Kirkman* (*d*) both parties were tradesmen. And when it was contended, that the exception extended to no other description of persons but merchants, Kenyon, Ch. J. over-ruled the

(*a*) Chap. Cas. 152. 2 Saund. 126. (*b*) 7 Mod. 270. (*c*) Bul. N. P. 149.
(*d*) Peake, N. P. 121.

objection, as he did also in the subsequent case of *Catling* v. *Skoulding* (*a*), where the parties were an attorney and a chandler.

Where the last item of an account is not within six years, the plaintiff relying on this exception, by his replication shews that the case never was within the statute; and must support that replication by proving himself to have been a merchant, and the account to be between merchant and merchant, his factor or servant, and be concerning merchandize. But if there have been mutual dealings and credits between persons not within the description in the statute, some of the items being of more than six years standing, and others within that time, the Courts, by an equitable construction of the exception, and to prevent such account from being divided, have considered the last items of credit evidence of an open account up to that time, and such open account to be within the equity of the exception, consequently, do extend this construction to the parties to the account.

With respect to the nature of the account, the distinction, as it may be collected from the cases, is between such as are current and open, and stated accounts. Current accounts are considered to be within the exception; on the contrary, stated accounts have been constantly held to be barred by the statute.

A matter (*b*) was referred to the three Justices of the King's Bench, Jones, Croke, and Barkely, between Sir G. Sandys and one Blodwell. There was an account

(*a*) 6 T. R. 109. (*b*) Jones 401.

between the testator of Sandys and the said Blodwell, both merchants, Blodwell acknowledged £1200. to be in arrear, but Freeman claimed more. Before the account was finished Freeman died, and his executor filed a bill in Chancery against Blodwell, who pleaded in bar the Statute of Limitations. And the Justices certified that he was not barred, because the account was not finished, and also because it was between merchants.

Assumpsit (*a*) by *Webber, merchant*, against *Tivill, merchant*, for money had and received, goods sold and delivered, and also on an account stated, upon which the defendant was found in arrear in £55. 11s. 7*d*. promise to pay, &c. Plea, the Statute of Limitations. The plaintiff replies, that the monies in the several promises mentioned, became due and payable on trade between the plaintiff and defendant as merchants, and wholly concerned merchandize: upon which the defendant demurred in law. And the question was, whether this debt, for which the plaintiff declared, were excepted out of the Statute of Limitations?

Saunders, who reports this case, and was counsel for the plaintiff, says, that the whole Court was against the plaintiff, for the reasons urged by Jones: who argued, that the case is not excepted out of the statute; for the statute intends to except nothing concerning merchandize between merchants, but only accounts current between them: and the reason was, because it often happens that merchants, who are as partners, or hold correspondence one with the other in several parts of the world, may have accounts current between them for several years

(*a*) 2 Saund. 124.

before they have an opportunity of meeting to state their accounts, and therefore the statute does not mean to limit such accounts. But here it appears, that the account for the £55. 11s. 7d. was *stated and agreed*, and then immediately it becomes a debt certain, being ascertained by the account, and continually afterwards remains as a dead debt, and there is no continuing account between the plaintiff and defendant to save it out of the Statute of Limitations. And for this debt, after the account stated, the plaintiff might have brought his action of debt; which would, without doubt, have been limited to six years by the statute; and therefore it is unreasonable that the plaintiff, by changing his action of debt to an action on the case, should elude a statute which was made for the public good. That actions of account on accounts between merchants are only excepted; but this is not an action of account, but a bare action on the case, which, as it appeared to him, was not excepted at all.

And as to the other part of the declaration, that was more clear, because that was only a bargain for wares sold and for money lent; and although it concerned merchandize, and was between merchants, yet that was no reason why it should be excepted out of the statute; for if it should be excepted, by the same reason every contract made between merchants would also be excepted, which was not the intention of the statute; for in the statute, accounts between merchants only are excepted, and not contracts likewise.

So, where in assumpsit (*a*) the doubt was, whether the declaration amounted to an account stated; for if it did,

(*a*) 1 Sid. 465.

then from that time it was not within the exception in the statute; for, from the stating of the account, that becomes a certain debt which was before an uncertain one. And therefore, though an account be running twenty years, or upwards, between merchants, yet there is no danger from the statute, because of the exception, which was made for a good reason. And this diversity between accounts stated, and unstated, as it was said, had been often agreed, and was not denied by the Courts.

So, in an indebitatis assumpsit (*a*) for money had and received to the plaintiff's use, and a quantum meruit for wares sold, and an insimul computasset, &c. to which the defendant pleaded "non assumpsit infra sex annos;" the plaintiff replied, that this action was grounded on the trade of merchants, and brought against the defendant as his factor, &c.: the defendant rejoined, that this was not an action of account to which the plaintiff demurred; and it was said by the Court, that the saving extends only to accounts between merchants, their factors and servants; and an action on the case will not lie against a bailiff or factor, where allowances and deductions are to be made, unless the account be adjusted and stated, as it was resolved in Sir Paul Neal's case against his bailiff. Where the account is once stated, as it was here, the plaintiff must bring his action within six years; but if it be adjusted, and a following account is added, in such case the plaintiff shall not be barred by the statute, because it is a running account; but if he should not be barred here, then the exception would extend to all actions between merchants and their factors, as well as to actions of account, which was never intended; and

(*a*) 2 Mod. 312.

therefore this plea is good, and the saving extends only to actions of account.

In another report of this case (*a*), North, Ch. J. Windham and Scroggs, Js. resolved that the exception in the statute goes only to actions of account, and not to other actions. And they took a diversity betwixt an account current and an account stated. After the account stated the certainty of the debt appears, and all the intricacy of account is out of doors; and the action must be brought within six years after the account stated. But by North, If after an account stated, upon the balance of it a sum appear due to either of the parties, which sum is not paid, but is afterwards thrown into a new account between the same parties, it is now stepped out of the statute again. And by Scroggs, J. The statute makes a difference betwixt actions upon account, and actions upon the case. The words would else have been, "all actions of account, and upon the case, other than such actions as concern the trade of merchandize;" but it is otherwise penned,—"other than such actions as concern, &c." and as this case is, there is no action betwixt the parties; the account is determined, and the plaintiff put to his action upon an insimul computasset, which is not within the benefit of the statute.

To an action on the case (*b*), brought upon a promise made by the defendant to pay a bill of exchange drawn fourteen years before, the defendant pleaded the Statute of Limitations. The plaintiff replied, that the bill was a negociating bill, and that it was upon an account between merchants, &c. The defendant demurred, and had judg-

(*a*) 1 Mod. 270. (*b*) 2 Mod. 105.

ment, because the statute excepts only accounts which are current between merchants, and not any which are stated; for if an action is brought against a drawer for value received, that is no account current, but an account stated.

It was also said, in the case of *Scudamore* v. *White* (*a*), in Chancery, that the Statute of Limitations is no plea in bar to an open account.

It is observable, that, in the above cases, wherein the plaintiff has relied on the exception concerning merchants to avoid the Statute of Limitations, the accounts had been stated and settled, and a balance struck, for which the action was brought more than six years afterwards: and it may be collected from them, that when the intricacy of account is removed by a statement, the Statute of Limitations attaches from the time of such statement; but although the inference from those cases is, that no length of time will bar the plaintiff from recovering while the subject matter is in account, and the specific remedy is the action of account; yet this must be received with some qualification; for if, between merchant and merchant, dealings betwixt them have ceased for several years, and one of them die, and the surviving merchant bring a bill for an account, the Court will not decree an account, but leave the plaintiff to his remedy at law.

The plaintiff's (*a*) late husband, and defendant, had dealings together as merchants, the bill was for an account; and although it was agreed that the length of time was no bar, yet the plaintiff's husband living many years

(*a*) 1 Vern. 456. (*b*) 2 Vern. 276.

after the trade and dealings between them ceased, and after some differences and disputes had arisen between them, and acquiesced to the time of his death; the Court therefore dismissed the bill, and left the plaintiff to recover at law, if she could. Per Lord Hutchins.—Amongst merchants, it is looked upon as an allowance of an account current, if the merchant that receives it does not object against it in a second or third post.

I find it impossible to trace the gradual progression, from the strict construction of the exception apparently established in the above cases, and that which, at the present day, takes other accounts, neither relating to merchandize nor to merchants, out of the statute: but certainly a more favourable construction for the plaintiff prevails; for the statute says, that no action of account, other than such as concern merchandize between merchant and merchant, their factors and servants, shall be excepted from the limitation. To give effect to what has been admitted to be evidence of an open account, the accounts themselves, when evidenced, have been considered of the nature of those within the exception. For the equity would, in fact, have done nothing, by admitting the last item of a mutual account between persons not merchants, for items not strictly of merchandize, to be evidence of an open account, if, when the account were so proved to have been open up to that time, the plaintiff could be turned about by being told, that though he had proved his account, he had not taken his case out of the statute, by proving it likewise an account for merchandize between merchants. The exception in the statute, according to argument of Jones in *Webber* v. *Tivill*(a), and the

(a) Ante 72.

opinion of Atkyns, J. in *Farrington* v. *Lee* (a), extends to accounts only which, from their nature, might be unavoidably kept open for many years; and not to those which, from the circumstance of the parties being inland merchants or shopkeepers, might be liquidated within the time limited: therefore, the admission of evidence to prove the existence of an open account, would have proved only such an account as the statute bars after six years, had not the Courts of Law gone further, and considered the parties to be merchants, and the accounts to be as between merchant and merchant. Otherwise the accounts would be divided, and that part which was more than six years standing could not be allowed.

Lord Hardwicke was aware of the difficulty in the construction of this exception; and what was laid down by him in Chancery, in the case of *Welford* v. *Liddel* (b), may have had considerable influence on the present practice. It is not, he said, that the defendant may not plead the statute in all cases where the account is closed and concluded between the parties, and all dealings and transactions over: it was not the meaning to hinder that; but it was to prevent dividing the account between merchants, where it was a running account; when, perhaps, part might have begun long before the time of the statute, and the account never settled; and perhaps there might have been dealings and transactions within the time of the statute.

The following cases will exemplify the construction of the exception as it is now acted upon, both with respect to the accounts, and the evidence of their existence.

(a) Ante 74. (b) 2 Vez. 400.

In the case of *Cotes* v. *Harris* (*a*), the plaintiff replied a bill of Middlesex; and that the testator, in his life-time, promised to pay within six years before the bill of Middlesex sued out.

The first item in the bill, whereon the demand arose, was in 1746; and all the items, except the last, were above six years standing before the bill of Middlesex sued out. It was insisted for the plaintiff, that the last item being within six years, and this being a current account, never liquidated, should draw the former items out of the statute. But Denison, J. held, that the clause in the Statute of Limitations about merchants accounts, extended only to cases where there were mutual accounts and reciprocal demands between two persons; but if there were only a demand by A. against B. in the common way of business, as by a tradesman on his customer, that cannot be called merchants accounts: and he was very clearly of opinion, that in this case the statute was a bar to all demands of above six years standing. But,

In *Cranch* v. *Kirkman* (*b*), there were mutual dealings. It was action for goods sold and delivered by the testator, to which the defendant pleaded the general issue, and gave a notice of set-off for goods sold and delivered, &c.

The defendant's set-off consisted of several items for goods sold at different times, from 1783 to 1788. The plaintiff's demand accrued chiefly in the year 1783, but there were two small articles sold in the year 1789.

(*a*) Bul. N. P. 14[illegible] (*b*) Peake 121.

It was contended on the part of the plaintiff, that the greatest part of the set-off was within the Statute of Limitations, no promise being proved within six years: but Lord Kenyon said, he thought this was within the exception in the statute as to merchants accounts. He agreed, that where the demand of one party arises long after the demand of the other, that should not revive the antecedent account; but this was in the nature of a running and mutual account between the parties; and was precisely the case put by Mr. Justice Denison in *Cotes* v. *Harris* (*a*), which his Lordship said he particularly remembered; and of which, he believed, no one but himself had taken a note; the report of it which appeared in print having been furnished by himself.

In the case of *Catling and another, executors of Tuthil,* v. *Skoulding and another* (*b*), assumpsit was brought for the use and occupation of a house, &c. in the life-time of the testator; and other common counts. The defendant pleaded, first, the general issue; secondly, the Statute of Limitations; and, thirdly, a set-off for goods sold and delivered. The replication to the second plea was, that the defendant did promise within six years, on which issue was joined. To the third plea, that the testator was not indebted to the defendants, as in that plea alleged.

The testator was an attorney at H., the defendant, and another partner, who suffered judgment to go by default, were merchants, dealers in spirituous liquors, and tallow-chandlers, and hired of Tuthil the premises in question, at the time of whose death nine years and half rent

(*a*) Ante 79. (*b*) 6 T. R. 189.

was due up to Michaelmas 1779, amounting to £209. and also £20. for cash on account, on the 19th of October 1781. During the time that these arrears of rent were becoming due to the testator, the defendants furnished him with various articles in the way of their trade. The balance due to the estate at his death was above £171. There never was any settlement of accounts between the testator and the defendants. The last half year's arrear of rent, and one or two of the last articles of the defendant's bill, were within six years before the plaintiff's writ was sued out.

It was objected for the defendant, that upon the words of the statute, the exception is confined, first, to actions of account; and secondly, to such accounts as were between merchant and merchant; and thirdly, to such as concerned merchandize. It must be an account current, kept between the parties as such, and not certain specific cross demands, of a distinct nature, as in this case; the demand being on one hand by an attorney, for use and occupation, and on the other hand, for a chandler's bill: for otherwise, every cross demand might be converted into an account current, to prevent the operation of the statute. But even if it were considered as an account current, the law would not raise a promise merely on that account; and that such an account was not within the exception of the statute. And, secondly, that the replication was bad, being too general; and that it ought to be according to the precedent in *Webber* v. *Tivill* (a).

But it was adjudged by Lord Kenyon and the Court, that where there is *no* item of account at all within six

(a) 2 Saund. 124.

years before the action brought, the plaintiff will be precluded, unless he can bring his case within the exception of the statute concerning merchants accounts; and in such a case, his replication must bring his case within the statute. But it must be remembered, that there the plaintiff is not barred, though there has been no transaction of any kind between the parties for six years: for by his replication he insists, that his case never was within the statute, for that the "accounts were between merchant and merchant, &c." But the present case steers wide of that objection; it is not doubted but that a promise or acknowledgment within six years will take the case out of the statute; and the only question is not evidence of an acknowledgment in the present case. Here are mutual items of account; and every new item and credit in an account, given by one party to the other, is an admission of there being some unsettled account between them, the amount of which is after to be ascertained; and any act which the jury may consider as an acknowledgment of its being an open account, is sufficient to take the case out of the statute. Daily experience teaches us, that if this rule be now overturned, it will lead to infinite injustice. In *Cotes* v. *Harris* (*a*) all the items were on one side; and Denison, J. who well knew what was the proper replication in such cases, and was well acquainted with the import of the Statute of Limitations, said, where all the items were on one side, the last item which happens to be within six years, shall not draw after it those that are of longer standing: but it was not doubted there, but that if there had been mutual demands, the plaintiff might have recovered.

(*a*) Ante 79.

Where the scope of an act appears to be in a general sense, the law looks to the meaning, and extends it to particular cases within the same reason; therefore actions of assumpsit are considered to be within the statute, though not specifically mentioned, because within the same mischief as those limited: and another reason (*a*), that actions of trespass, mentioned in the act, are comprehensive of assumpsit, because it is a trespass on the case.

The statute may be pleaded (*b*) to indebitatus assumpsit against the sheriff, for the money levied upon a fieri facias; but if case were brought, for not bringing the money into Court at the return of the writ, *per quod damnum habet*, the statute would not be pleadable; for in the one form the action is founded on the contract, but in the other it is grounded on a specialty, viz. the record of the judgment of the Court. It was said (*c*) to have been resolved that the Statute of Limitations was not a good plea against an attorney that brings an action for his fees, because they depend upon a record, and are certain. In the case of *Rudd* v. *Berkenhead* (*d*), no such objection was made to the plea in an action of assumpsit by an attorney; but in *Oliver* v. *Thomas* (*e*), where assumpsit was brought for fees and money expended, and labour and pains in prosecuting divers suits, the defendant pleaded the Statute of 21 Jac. 1. of Limitations, whereupon the plaintiff demurred: and it was argued for the plaintiff, that this action being by several counts or declarations, whereof one only was for fees, and the others for money laid out, and labour and pains in the prosecution, the statute was not pleadable to that count, which is for fees only, because it arises upon matter of record,

(*a*) 2 Mod. 71. 2 Saund. 120. (*b*) 1 Mod. 246. (*c*) 1 Mod. 246.
(*d*) Carth. 144. (*e*) 2 Lev. 367.

viz. his being attorney of record. But by the whole Court, viz. Treby, Nevile, Powell, and Rokesby, it was held, that the statute is pleadable to the count for fees; for the fees are not of record; and a case was cited where it was so adjudged within two years before, whereupon judgment was given for the defendant.

So in the case of the assignment of a debt by the commissioners of bankrupts, the assignment being by virtue of an act of parliament, it has been doubted whether the debt were not taken out of the statute. In assumpsit (*a*) as assignee of the commissioners of bankrupts for a debt due by contract to the bankrupt, the defendant pleaded the Statute of Limitations, and the plaintiff demurred; and it was argued, that the statute extends not to this case, the debt being assigned by virtue of an act of parliament, and said to have been so adjudged; whereupon a day was given to shew that record: but there is no such question at the present day; for it has long been settled, that when the time of limitation once begins to run, nothing subsequent stops it; although Holt, Ch. J. (*b*) is reported to have held otherwise, being of opinion that an administrator should have six years from the time of granting the administration; but the current of authority and the practice is the other way.

To an action (*c*) by the assignee of the commissioners of a bankrupt, the defendant pleaded "non assumpsit infra sex annos;" and the plaintiff replied the bankruptcy and assignment, and that the cause of action arose within six years before the assignment. The Court, on demurrer, held the replication to be ill, because, when the six years were once begun, the statute runs over all mesne acts,

(*a*) 2 Lev. 166. (*b*) Carth. 337. (*c*) Str. 555.

such as coverture, and infancy, as in the case of a fine. And it would be to defeat the statute, as to all simple contracts, if an assignment at the end of five years and half were to set all at large again.

The South Sea Company (*a*) (in whom the estates of the late directors were vested by act of parliament) filed a bill, to which the Statute of Limitations was pleaded; and it was argued, that the plaintiffs claiming by matter of record, the debt was taken out of the statute. But the Lord Chancellor held the law to be clearly otherwise; for that the South Sea Company could not be in a better situation than Surman was, against whom, as the defendant might have pleaded the statute, so might he also do against the Company, who stood but in Surman's place: and he likened it to the case of an assignee under a commission of bankruptcy, who, though he claims under the acts concerning bankrupts, and also by virtue of the assignment, which is under the great seal, yet, as he stands only in the place of the bankrupt, against whom the Statute of Limitations is pleadable, so is he (the assignee) liable to be barred thereby.

But where the whole of a bond has been paid by one obligor, and he brings assumpsit against his co-obliger for contribution, it is doubtful whether the Statute of Limitations would be a good plea, or whether such action would not be allowed the same limitation as the bond itself.

Lord Kenyon observed, in the case of *Cole* v. *Saxby* (*b*), which was by the executor of one obligor against the

(*a*) 3 P. W. 144. (*b*) 3 Esp. 160.

co-obliger for contribution, that he had considerable doubts whether the Statute of Limitations attached on the case. The demand arose under a deed; and there had been a case in which a very considerable law authority had been of opinion, that such a debt was entitled to the same limitation as the deed itself.

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All contracts (*a*) are, by the laws of England, distinguished into agreements by specialty, and agreements by parol; nor is there a third class, as contracts in writing. If they be merely written, and not specialties, they are parol. It may be laid down as a rule, that parol contracts are within the Statute of Limitations, and barred after six years; and that contracts founded on specialties are not within the statute. The first part of the rule has admitted of some exceptions, but the latter part of it has been unvarying; and although the words of the statute limit to six years all actions of debt for arrearage of rent, the construction is, that the rent, to be within the statute, must have been reserved on a parol demise; for if by indenture, it is a contract on a specialty, and excepted.

The plaintiff (*b*) counted upon a lease by indenture for twenty years, rendering rent: and in debt for the arrearages of the rent, it appeared that the arrearages of rent, for which the action was brought, were due six years and more before the action brought.

The, Lord Rishardson was of opinion that judgment should be given against the plaintiff, because the statute

(*a*) 7 T. R. 350. (*b*) Hut. 109.

extends to debts for arrearages of rent expressly; but afterwards changed that opinion, and agreed with the other judges of the Common Pleas, Hutton, Harvey, and Yelverton, that this action of debt, being upon a lease, by indenture, is not limited to any time by the statute, but is out of it, and shall be brought as before the making of this statute. The words are, "All actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent, &c." and this is an action upon a contract by specialty, 4 H. 6. c. 31. he ought to declare upon the indenture, and it is a contract, viz. a lease: and there is cause of using the indenture every half year; and it was resembled to the case upon the Statute of 32 H. 8. of Limitation. *A rent-charge* which is founded upon a deed, or a reservation upon a fee-simple by deed, is not within the Statute of Limitations. And nothing in this statute was intended to be limited which was founded upon a deed. And the words, "debt for arrearages of rent," are supplied and satisfied by the arrearages of rent upon a demise without a deed. And as to the objection, that the proof of payment might be wanting, when the action is brought so long after the rent became due, that might be objected to debt on an obligation, where the day of payment is for a long time past.

So, where debt (*a*) was brought on the Statute of Tithes (*b*), for carrying away the corn, the tithes not being set out, 20 Jac. 1. and 21 Jac. 1. and so on, until the 11 C. 1. the defendant pleaded for the last three years non debet, and for the residue, the Statute of Limitations. And hereupon the plaintiff demurred; and the record

(*a*) Cro. Car. 513. (*b*) 2 Edw. 6. c. 13.

being read, all the Court held, that the statute does not extend to this action.

Nor to debt (*a*) for an escape of one in execution; because the words of the statute are, that all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent, shall be brought within six years. And this action of debt is not within the statute for two reasons; first, because the action is not founded upon any lending or contract, therefore not limited or restrained by the statute; and secondly, that the action of debt on an escape is founded on a specialty, namely, upon Statute Law, and so out of the Statute of Limitations. For at Common Law (*b*) no action of debt lay against a gaoler for an escape out of execution. The statute 1 Rich. c. 12. gave to creditors an action of debt against the warden of the Fleet upon an escape out of execution; and the statute, by construction, extends to all other gaolers and sheriffs; and so the statute is a specialty upon which the action is founded, and it is therefore clearly out of the words and intention of the Statute of Limitations.

It was said by Buller, J. (*c*) that this action of debt depends upon two very old statutes, which never have nor can be construed literally; the first of which is Westminster 2. which is entitled, "The masters' remedy against their servants or accomptants." If we were to stop here, this case would not come within it; but then it enacts, "Let the sheriff take heed that he do not suffer him (the prisoner) to go out of prison; and if he do, and be thereof convict, he shall be answerable to his master of

(*a*) 1 Saund. 35. (*b*) 2 Inst. 382. (*c*) 2 T. R. 132.

the damages done to him by such his servant, according as it may be found by the country, and shall have his recovery by writ of debt." This statute therefore enacts, that the creditor shall recover against the gaoler those damages which he has suffered by his servant: and this statute, by a liberal construction, has been held to extend to all cases. The next is the statute of 1 Ric. 1. c. 12. which, in express terms, mentions only the warden of the Fleet: but that also, by construction, has been extended to all gaolers. The sense of these statutes is, that the party who suffers by the escape, shall have the same remedy against the gaoler which he had against the debtor.

But to an action on the case against the sheriff for an escape, the Statute of Limitations may be pleaded; because the action lays at Common Law, and is not dependent on any specialty, but the escape, which is a naked matter of fact. Per Buller, J. (*a*) The distinction between an action of debt and on the case is this; at Common Law, an action on the case only lay against the sheriff or gaoler for an escape, in which case the creditor might recover damages for the officer's misconduct; but still he had a right to recover the debt against the original debtor. But the statutes gave an action of debt against the sheriff or gaoler to recover at once the sum for which the prisoner was charged in execution. Now these being affirmative statutes, did not take away the Common Law remedy, so that the creditor has his election; but if he adopt the latter, he must recover the whole sum.

(*a*) 2 T. R. 127.

Debt was brought on an award (*a*): the declaration stated, that there were divers controversies between plaintiff and defendant concerning certain monies due, &c.; and for quieting those controversies, on such a day they submitted themselves to the award of two arbitrators; and if they should not agree by a certain day, then to the umpirage of an umpire, to be chosen by the arbitrators, so as the umpirage should be under the hand and seal of the umpire before a certain day. It then averred, that the arbitrators made no award, but chose one W. who, within the time, made an umpirage under his hand and seal, and awarded the defendant to pay £15. for which the action was brought. Plea, the Statute of Limitations, to which the plaintiff demurred.

And it was argued for the plaintiff, first, that this was a specialty, for the umpire had made his umpirage in writing under his hand and seal; and that notwithstanding a man cannot wage his law against a specialty, but may wage his law against an award in writing under hand and seal, unless the submission were by specialty under the hand and seal of the party who submits to such an award, and that this was not such a specialty as should oust the party of his law, yet it was a good specialty to prevent the limitation of the action upon it to six years, on account of the notoriety of the thing, being in writing, and in hand and seal.

2dly. It was argued, secondly, that admitting there was no specialty, yet the action of debt on an award was not limited by the statute; for the words being, "all actions of debt grounded upon any lending or contract without

(*a*) 2 Saund. 64.

specialty," &c.; therefore, all actions of debt without specialty generally, are not limited, but only those without specialty, grounded on a lending or contract; and that this action of debt was not founded upon any lending, and therefore not limited, though it be without specialty. That all actions of debt are founded upon a contract raised either in fact, or by construction of law: and if the statute meant to limit all actions of debt generally, without specialty, the words "grounded upon any lending or contract" would be superfluous; but that the statute intends to restrain and limit those actions only which were founded upon any lending or contract in fact, as appears by the words: and the word lending explains the word contract to be of the same nature, That in the present case, the action of debt was not founded upon any lending or contract, but was a debt *ex quasi contraitu*, according to the civilians, for which the law gives an action of debt, although there is no contract between the parties.

Kelynge, Ch. J. principally for the first point; Twisden principally for the second; and the other Judges for both points, resolved for the plaintiffs that the action was not within the Statute of Limitations.

To an action of debt brought by an executor against a sheriff, to recover money levied on a fieri facias, under an execution sued out by the testator, the defendant cannot plead the Statute of Limitations.

The plaintiff (*a*) declared, that his testator recovered a judgment in the Common Pleas, upon which he sued out

(*a*) 3 Mod. 212.

a fieri facias, which he delivered to the defendant, being sheriff of Lincoln; and thereupon the sheriff returned fieri feci; but that he had not paid the money to the plaintiff, *per quod actio accrevit*, &c. The defendant pleaded the Statute of Limitations, to which the plaintiff demurred. And the question was, whether this action was barely grounded on the contract, or whether it had a foundation on matter of record? And the case was held not to be within the statute, because the action was brought against the defendant as an officer who acted by virtue of an execution, in which case the law did create no contract; and that there was a wrong done, for which the plaintiff had taken a proper remedy, and therefore should not be barred by this statute.

In another report (*a*) the action is said to be upon the case against the sheriff, for that he levied such a sum of money upon a fieri facias, at the suit of the plaintiff, and did not bring the money into Court at the day of the return of the writ, *per quod*, &c. And by the Court—If the fieri facias had been returned then, the action would have been grounded upon the record, and it is the sheriff's fault that the writ is not returned; but, however, the judgment in this Court is the foundation of the action.

From which cases it will be collected, that wheresoever the debt is founded on a specialty, it is not within the statute. Other exceptions have been taken, as in cases where the debt has arisen out of any lending (*b*) or contract in fact, although without specialty, and in those actions that rarely occur. Therefore debt for a copyhold

(*a*) 1 Mod. 245. (*b*) 1 Saund. 35. Ib. 64.

fine (*a*) has been adjudged not to be within the statute, because there is no lending or contract in fact. Nor upon the writ de rationabile parte bonorum, because a case that seldom happens.

In the Common Pleas (*b*), upon non detinet pleaded to such a writ, it was found that the plaintiff was entitled to this action many years before the statute 21 Jac. 1. and that he had not brought his action within the time limited. Upon the special verdict the case being argued was adjudged for the plaintiff: because this action is an original writ in the register, and is not mentioned in the act. And though the issue is non detinet, it is not an action of detinue, for a writ of detinue lies not for money, unless it be in bags; but rationabile parte bonorum lies for money in pecuniis numeratis. Another action lies not before the debts are paid: and the account was, that thereby it might be known for what it should be brought; and that, in many cases, requires longer time than the statute gives.

Another reason was, that the statute was not made to extend to those cases which seldom or never happen, as this case is; but to those which frequently happen. Also, the statute tolls the Common Law, and should not be extended to Equity.

Mr. Serjeant Williams, in his edition of Saunders, 2 vol. 67. (9.) observes, This writ lies where the wife, after the death of her husband, cannot have the third part of her husband's goods, after payment of debts and funeral expences, and then she may have this writ against the

(*a*) 1 Lev. 273. (*b*) Hutt. 109.

executors of her husband. And it seems by the Statute of Magna Charta, c. 18. that this was the Common Law of the realm at that time: and it appears by Glanvil, that it was the Common Law in his time, that after payment of debts, the goods were divided into three parts; one part to the wife, another part to the sons and daughters, and the third part to the executors; and the sons and daughters are also entitled to have the like writ against the executors, in case their third part is withheld.

A debt barred by the Statute of Limitations (*a*) cannot be set off. And if it be pleaded in bar of the action, the plaintiff may reply the statute; or if it be given in evidence under a notice of set-off, it may be objected to at the trial.

It was a question formerly, whether the statute extended to mariners wages :—

To a libel in the Admiralty (*b*) by the seamen against the owners for wages, the defendants pleaded the Statute of Limitations; viz. that it appeared by the libel, that no suit was prosecuted for this matter within six years; whereas they should have pleaded directly, that no suit had been brought within six years after the cause of action accrued; and if the statute had been rightly pleaded it would have been a good bar: for per Holt, Ch. J. Though the statute doth not extend to causes maritime, spiritual, or equitable, but only to duties at Common Law, yet mariners wages are a duty at Common Law, and if sued

(*a*) Str. 1271. B. N. P. 180. Selw. N. P. 139. (*b*) 3 Salk. 227.

for at Common Law, the statute would have been a good bar.

And upon a motion for a (*a*) prohibition to the Admiralty, suggesting a contract at land, and a suit for wages thereon by the mariners against the owners, upon an outward-bound voyage, and that he had pleaded the Statute of Limitations in that Court, which plea was rejected for that the statute did not extend to causes maritime, &c. And it was insisted for the prohibition, that the Common Law had a proper jurisdiction for mariners wages, and that the suit might be as well brought for such wages in the Courts of Common Law as the Admiralty; so that the Admiralty had at most but a concurrent jurisdiction in this case with the Courts of Common Law, and that only by indulgence of Law, which ought not to be extended so far as to suffer them to proceed in the Admiralty otherwise than they might at Common Law.

But the statute of 4 Anne, c. 16. s. 17. enacts, that "all suits and actions in the Court of Admiralty for seamen's wages, shall be commenced and sued with six years next after the cause of such suits or actions shall accrue, and not after.

(*a*) 3 Salk. 228.

## CHAP. V.

### *Of Actions on Torts.*

ACTIONS on the case for torts, other than slander, must be brought within six years of the cause of action accruing: actions for words, within two years after the words spoken. This form of action lies to recover damages for torts without force, where the injury is consequential, and not immediate. The Statute of Limitations, therefore, runs not on the committing of the act, but on the injury that follows; for the act itself is not actionable till the consequence has made it so, and the time only runs from the accruing of the cause of action. But if the cause of action be grounded upon a record, or arise ex malefecio, it is not within this statute.

In an action (*a*) against a sheriff, for such a sum of money upon a fieri facias, at the suit of the plaintiff, and did not bring the money into Court at the day of the return of the writ, *per quod deterioratus est et damnum habet*, &c. the defendant pleaded the Statute of Limitations, to which the plaintiff demurred. The Court gave judgment for the plaintiff, *nisi causa*, &c. If the fieri facias had been returned, then the action would have been grounded upon the record, and it is the sheriff's fault that the writ is not returned; but, however, the judgment in this Court is the foundation of the action.

(*a*) 1 Mod. 240.

Debt upon the statute of 2 Edw. 6. c. 13. for not setting out tithes, is not within the statute, for oritur ex maleficio: so the ground of this action is maleficium, and the judgment here given; in both respects it is not within the Statute of Limitations.

The statute enacts, that the action sur trover shall be commenced and sued within the time and limitation after mentioned; but in the perclose, trover is omitted; from which it has been contended, that trover was not within the Statute of Limitations, but was omitted. But all the Court, in the case (*a*) wherein the objection was taken, conceived, that although actions of trover are not mentioned in the perclose, yet, the words being, that "actions upon the case shall be brought within six years, and actions for words within two years;" in those general words of actions upon the case, the action of trover is implied.

And the time within which an action of trover must be commenced, is six years from the accruing of the cause of action, which is on the conversion (*b*); for any man may take the goods of another into possession if he finds them; but no finder is allowed to acquire a property therein, unless the owner be for ever unknown: and therefore he must not convert them to his own use, which the law presumes him to do, if he refuses to restore them to the owner; for which reason, such refusal alone is, prima faciæ, sufficient evidence of a conversion.

So, where the plaintiff, in his declaration (*c*), stated, that 1 March, 21 Jac. 1. he was possessed of a ship, and

(*a*) Cro. Car. 246. (*b*) 3 Comm. 153. (*c*) Cro. Car. 245.

nine pieces of ———, and the same day lost them, which came to the defendant's hand; who, 3d October, 3 Car. 1. converted them to his own proper use. The defendant pleaded the Statute of Limitations, and that the 20th March, 19 Jac. 1. causa actionis accrevit; so as not only three years and more were incurred since the parliament, but also six years after the conversion, before any action commenced.

The plaintiffs replied, that they were possessed of the said ship as of their proper goods; and so being possessed before the 20th March, 19 Jac. 1. viz. 1st March, 19 Jac. 1. they agreed at London aforesaid, in parochiâ et wardâ predictâ, that the said defendant, as their servant, should transport the said ship and goods to T. in Spain, being parts beyond seas, and should afterwards restore them to the plaintiffs upon request; whereupon the defendant, taking the said ship the said 1st March, 19 Jac. 1. transported her to the parts beyond seas, viz. to T——, and 20th March, 19 Jac. 1. there sold the said ship and goods to persons unknown, and converted them to his proper use: and that the defendant, after the said conversion, remained in partibus transmarinis usque 1 May, 1 Car. 1. by reason of which stay they could not sue him per legem terræ: and that 1st May, 1 Car. 1. he returned; whereupon, the 1st October, 3 Car. 1. at London, they required him to deliver the said ship and goods, which to do he refused, but the said ship and goods, ad tunc et ibidem, converted and disposed prout superius continetur: to which the defendant demurred.

And it was a question, if this request and non-delivery after his return, be not a new conversion and cause of

action, so that although he was barred before by the Statute of Limitations, whether he should not be hereby restored to that action? And Jones and Whitlocke conceived that he should, and that it may be well intended the goods came into his hands again after his sale, and the demanding them of him, and his denial and conversion, is good cause of action; but Croke doubted thereof.

This was again moved (a), when Richardson, Jones, and Berkeley held, that when it is alleged that the defendant returned from beyond seas 1 Car. 1. and that the plaintiff, 3 Car. 1. required the re-delivery, and he refused; and afterwards, the same 1st October, 3 Car. 1. converted them to his proper use; it shall be intended, that the said goods came a second time to the defendant's hands; and that they being in his hands, the plaintiff required the delivery of them; and that afterwards, the same day, he converted them, and that upon this conversion the plaintiff had grounded his action, and the plaintiff had election upon which conversion he would bring his action; and then he is clearly out of the said Statute of 21 Jac. 1. c. 16. the action being brought within two years after the last conversion, and so well brought. But Croke doubted how this action should be maintained, without shewing how they came to the defendant's hands, where it is allowed that once he sold them, in 19 Jac. 1. and converted the money to his proper use; and the allegation that he after refused to deliver, and converted them to his proper use, without shewing how he came to them, could not be good. But the other three Justices

(a) Cro. Car. 333.

being against him, they gave rule that judgment should be entered for the plaintiff.

So, where an executor (*a*), several years before, had left some household stuff in the house, by the consent of the heir, who used them afterwards; and within six years of the action brought, the executor demanded the goods, and the heir refused to let him have them; whereupon trover was brought, and the Statute of Limitations pleaded. It was held by the Court, that the user before the demand was no conversion, nor evidence of it; for it was with the consent of the executor till then: and the demand being within six years, the refusal which ensued it, and is the only evidence of a conversion in the case, was within six years; and if a trover be before six years, and a conversion after, the statute cannot be pleaded.

Which construction, as far as its principle goes, would perhaps rule the time from which the statute should run in actions for negligence against persons on retainer, where the negligence complained of is in some transaction of more than six years standing, but the damage to the plaintiff within that time.

In such an action (*b*) against an attorney, the negligence imputed to him by the declaration was, that an annuity having been granted to the plaintiff, he had been employed as his attorney to prepare the securities, and to enroll the memorial. It then charged, that he had so negligently and improperly caused the memorial to be enrolled, that by reason of a defect in such memorial, the securities had been set aside by rule of Court, and the

(*a*) 7 Mod. 99. (*b*) 4 Esp. 18.

plaintiff had lost the benefit of his annuity, and the money paid for the same. The defendant pleaded, first, Not guilty; and secondly, the Statute of Limitations, that the cause of action did not accrue within six years. The plaintiff had assigned the annuity to one Kirkby. The annuity had been set aside; and Kirkby had brought an action against the plaintiff for the consideration-money, which he had recovered back; this had taken place within six years.

Lord Kenyon said, as to the plea of the Statute of Limitations, he had not made up his mind on it; but the inclination of his opinion was, that the plea was insufficient; that in the case of an action of trover, if goods are left in the hands of another, the Statute of Limitations does not begin to run from the time of delivery, but from that of the demand and refusal.

Slander of title is not within the limitation of actions for slanderous words, because it is not actionable unless a special damage have arisen; and the limitation of two years on slanderous words applies only to words actionable at the time of speaking them.

Error of a judgment in Windsor (*a*), in an action on the case for slander of title. The plaintiff declared that he was seised in fee of lands, and the defendant said he had no title. And the error assigned was, that he did not shew by his declaration, that by the occasion of those words he had any prejudice.

(*a*) Cro. Car. 140.

The Court agreed, that the declaration was not good, and so the judgment erroneous, because the action is not maintainable, without shewing special prejudice, no more than for calling one whore or bastard, without shewing special cause of temporal damage; and was not like words spoken which imply slander and temporal loss, as thief or bankrupt, or such like. But slandering of one's title does not import in itself loss, without shewing particularly the cause of loss, by reason of the speaking the words, as that he could not sell or let the lands; but being general words, they are not sufficient: and that it was out of the statute, as well for the time of limitation as for the costs. Nor is Scandalum Magnatum (*a*) within the statute.

" In all actions upon the case for slanderous words, if the jury, upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed amount unto, without any further increase of the same."

The following cases will exemplify the principle that regulates the construction in actions for words, both as to the time of limitation and costs. In those cases in which no more costs than damages are given, the time of limitation is two years: where full costs are allowed, although the damages be under forty shillings, the action is out of the limitation of two years, but still within the limitation of six years; which runs from the time of the consequential injury.

(*a*) 1 Sid. 415.

In an action (*a*) for words, for calling the plaintiff a thief, and for procuring him to be indicted and imprisoned for felony, until he was acquitted. Upon not guilty pleaded, it was found for the plaintiff, and ten shillings damages (so under forty shillings). It was moved, that he should have but ten shillings for costs: but the Court conceived, forasmuch as this was not an action for words only, but also an action upon the case, in nature of a conspiracy, and the defendant was found guilty of both, he shall have judgment for his ordinary costs, and that it was out of the statute.

So, where the declaration (*b*) charged that the defendant, *falsò et malitiosè*, spake of plaintiff these words, "that the plaintiff committed felony," and procured him to be arrested for felony, and to be imprisoned for three days: the defendant pleaded Not guilty, and found against him generally, and damages to twenty shillings. It was moved that he might have no more costs than damages, the damages being under forty shillings. But because there was a precedent shewn in the above case of *Edwards* v. *Topsall*, it was resolved here to be out of the statute.

But where the plaintiff (*c*) counted that he was a clerk of the Inrolment Office, and that the defendant *crimen feloniæ ei imposuit*, by which he had like to have lost his office: the defendant pleaded, that as to the imposition of felony, otherwise than by speaking of scandalous words, Not guilty; and as to the speaking of the words, non infra duos annos; to which the plaintiff demurred.

(*a*) Cro. Car. 163. (*b*) Cro. Car. 306. (*c*) Ray 61.

On the trial, Wild, for the plaintiff, said that this was not within the Statute of Limitations, no more than slander of title. Jones, for the defendant, said, that the imposition of felony is actionable by itself, and then the other words are within the statute. Wild answered, that *crimen feloniæ imponere* cannot be by words alone, but by some act, as carrying him before a justice of peace, &c. Twisden, J. If the words were actionable at first, then the damages after do not give cause of action; and the first plea is a full bar, and the other fruitless; and of that opinion was the whole Court; and judgment was given for the defendant.

In an action on the case (*a*) for words spoken of the wife by the defendant, viz. " Mrs. Brown is a whore, and has done as all whores do;" *per quod* the plaintiff, being a tradesman, lost such and such, viz. A, B, &c. from being his customers, who were his customers before, &c. Upon Not guilty pleaded, the defendant at Nisi Prius gave evidence by way of mitigation of damages, that Mrs. Brown was a whore. And the evidence was very strong; upon which the jury gave damages but twenty shillings to the plaintiffs. And it was moved that the plaintiffs might have their full costs; which was opposed by Serjeant Darnall. And the Court held, that this action was not an action for slanderous words within the meaning of the statute, because the special damage is the gist of the action, without which it would not lie; and therefore such an action lies for the husband alone, without joining the wife, which is otherwise in a common action for words. And *Law* v. *Horwood*, Cro. Car. 140, was cited, and allowed by the Court to be a case in point,

(*a*) Ld. Raym. 831.

And Powell, Ch. J. said, that if the master brought an action of battery against J. S. for a battery committed upon his servant, *per quod servitium amisit*, if the jury, upon Not guilty pleaded, gave damages under forty shillings, the plaintiff should have full costs, notwithstanding the statute of 22 & 23 Car. 2. c. 9. which allows, in common actions of battery, no more costs than damages, where the damages are less than forty shillings. And the plaintiff in the principal case had full costs.

And by the Court, in *Phillips* v. *Fish* (*a*), which was an action on the case for these words, spoke of the plaintiff, viz. "Thou art a villain and thief;" *quorum quidem verborum propalatione*, the plaintiff was not only much damnified in his fame and reputation, *verum etiam arrestat fuit*, by procurement of the defendant, and carried before a justice of the peace, and there imprisoned. If the fact that comes under the *verum etiam* was only laid in aggravation of damages, so that the words are the gist of the action, then the plaintiff can have no more costs than damages; but if it be laid as a distinct fact, for which another action might be brought, then he shall recover full costs. Actions of Scandalum Magnatum, and for slandering a man's title, are actions for words, and yet not within the statute of 21 Jac. 1. c. 16. for the statute intended only to prevent frivolous actions for words. It is true, where a trespass is laid with a *per quod*, &c. as for instance, "per quod servitium," &c. or "per quod consortium uxoris amisit," there, whatever comes under the *per quod* must be proved, otherwise the plaintiff cannot have a verdict, because that is the gist of the action. But

(*a*) 8 Mod. 372.

in the principal case, the action is founded on the words spoken, and the procuring the plaintiff to be arrested for felony is laid in a different count, and the defendant is found guilty generally; the Court therefore inclined that the plaintiff should have full costs.

So, where the declaration (*a*) went on *quorum quidem falsorum verborum propalationis prætextu idem Carolus non solüm in bonis, nomine, et in negotiis suis houestis, multipliciter læsus et deterioratus existit, verum etiam occasione verborum prædictorum per procurationem* of the defendant he was taken up and carried before a justice (the words charging him with stealing a hen); there was a verdict for the plaintiff, and one shilling damages; and it was moved in Trinity Term, 12 Geo. 1. for full costs: and by the opinion of the Court, that the plaintiff should have full costs, because this was not laid as an aggravation, but as a distinct fact; he spoke the words, and he procured him to be carried before a justice.

But in an action (*b*) for words, the plaintiff set out in his declaration, that he was a house-smith by trade, and that the defendant spoke the words of him (which words were actionable in themselves), by reason of the speaking of which words the plaintiff had lost several customers, naming them particularly, to his damage of £100. On the general issue pleaded, the jury found for the plaintiff, and gave him only five shillings damages. And it was moved, that the plaintiff might have full costs, though the damages were found under forty shillings, because he had received a special damage, viz. the loss of his customers; so that if the words had not been actionable of

(*a*) Str. 645. (*b*) Ld Raym. 1588.

themselves, this action would have been maintainable, by reason of the special damage. And the two cases between *Phillips and Fish* and *Carter and Fish* were cited. But *per Curiam*, Where the words are not actionable, but the action is maintained by reason of special damages the plaintiff has sustained upon account of the words, the plaintiff shall have full costs, though the damages are under forty shillings; for it is not the words, but the special damage is the cause of the action. But where the words are actionable of themselves, as in the present case, and special damages are laid by way of aggravation, and damages are under forty shillings, there shall be no more costs than damages, for that is properly an action for words within the statute of 21 Jac. 1. c. 16. And as to the cases cited of *Carter* v. *Fish* and *Phillips* v. *Fish*, upon considering that declaration the Court held, that as it was laid, it was not barely laid in aggravation of damages, but was a distinct cause of action, importing *crimen feloniacei imposuit*, and therefore the plaintiff there had full costs. In this principal case the Court directed the plaintiff should have no more costs than damages.

In the case of *Surman* v. *Shelleto* (*a*), Mr. Harvey made a motion for full costs; though the jury had found only one shilling damages, they had given forty shillings costs. It was an action for words: and there was a colloquium laid about the plaintiff's trade; and also a special damage laid, of his having lost his business by reason of the speaking of the words. The words in question were contained in the third count, on which third count the verdict was taken; and they were these, "Thou art a rogue, and thou hast cheated me of several pounds." The rule,

(*a*) Burr. 1688.

he said, was, "that where the words are not actionable in themselves, there shall be full costs, if special damages are laid; though the damages found be under forty shillings." And to shew that these words are not in themselves actionable, he cited Hardr. 8. *Wake* v. *Chapman et ux.* and 5 Mod. 398. *Savage* v. *Robury*. Indeed, if the words spoken are in themselves actionable, and less damages found than forty shillings, there shall not be full costs except there be a colloquium, and special damages laid as a substantive and independent injury. But the Court held the latter words, "thou hast cheated me of several pounds," to be actionable; and told Mr. Harvey he must be content with forty shillings costs.

Case for words (*a*). The declaration stated, that at a public auction, on the 29th April 1775, a small glass bottle being missing, the defendant said, first, "That man [pointing to and meaning plaintiff] has put one in his pocket, I saw him take it; he has got it"—meaning to impute to plaintiff that he had feloniously stolen it. Secondly, that he said, "That man has put one in his pocket, I saw him take it; and he has got it." Thirdly, that the words were, "I saw him take it:" by means whereof he was publicly searched, and exposed to great disgrace; and one John Woolgar, and others, have since refused to trust the plaintiff. On Not guilty and issue thereon, a general verdict was for the plaintiff, Damages one shilling.

Davy moved that the Prothonotary should allow full costs. He agreed the rule to be (as laid down in *Burry* v. *Perry*, 2 Ld. Raym. 1588. and recognized by two cases

(*a*) 2 Bl. 1062.

in Barnes, 18 and 25 Geo. 2.) that where there are special damages laid in the declaration, and the words are in themselves actionable, then, if the jury find a verdict for less then forty shillings, there shall be no more costs than damages; for the special damage is only laid as a matter of aggravation, and not as the cause of action. But if the words are not in themselves actionable, then the special damage is the only cause of action; and that will carry full costs, of whatever amount the verdict may be. In the present case, he allowed the words in the first count to be actionable, as imputing the crime of felony: but those in the second or third count, not being laid as a charge of felony, are not actionable. And this being a general verdict, some of the damages must be intended to be given upon each of those counts, which (though it be but a farthing) would carry costs, as it could only be given for the special damage.

Walker, for the defendant, insisted on the same rule, and that all the words in every count were equally actionable, being all under the same introduction and conclusion.

And of that opinion was the Court (absente De Grey, Ch. J.), that all three sets of words being under the same introduction, stating the good character of the plaintiff, and the intent of the defendant to cause him to be suspected of stealing, and being under the same conclusion, were all equally actionable.

And by Gould, J. that the distinction, as stated by Davy, between words actionable and not so, with regard to their carrying costs, when coupled with special

damages, and the verdict under forty shillings, was a clear and settled distinction: there must be no more costs than damages.

Blackstone, J. said, that he must yield to the weight of authorities which had settled this distinction, though he thought it was too artificial and refined. In his own plain understanding he could only conceive, that the smallness of the damages ought to exclude full costs, even though the plaintiff complained of a special injury, whether the words are actionable or not; and therefore he had no scruple in discharging the present rule. But he could not so well reconcile it to his own mind, that, *cæteris paribus*, the plaintiff should recover full costs if the words be innocent, but not so if they are highly scandalous.

Nares, J. said, the rule was certainly as stated by Davy at the bar, and then by his brother Gould, therefore the rule was discharged.

Trespass is within the words of the statute. With respect to trespass to lands, it is enacted, that in all actions of trespass quare clausum fregit, wherein the defendant shall disclaim in his plea to make any title or claim to the land in which the trespass is by the declaration supposed to be done, and the trespass be by negligence, or involuntary, the defendant shall be admitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends before the action brought: whereupon, or upon some of them, the plaintiff shall be enforced to join issue; and if the issue be found for the defendant, or the plaintiff shall be nonsuited, the plaintiff shall be clearly

barred from the said action or actions, and all other suit concerning the same.

Trespass quare clausum fregit, and to personal property, must be brought within six years: the statute, therefore, may (*a*) be pleaded to trespass for mesne profits, and the defendant may by that mean protect himself from all but the last six years. And trespass to persons must be brought within four years of the trespass committed. But when the trespass has been continued many years, and the Statute of Limitations pleaded, the jury gives damages only for the time within the statute.

In an action (*b*) for an assault, and imprisoning plaintiff from 10th August, 24 Car. 2. until 2d October, 1 Jac. 2. the time of exhibiting the bill, to which the Statute of Limitations was pleaded, and found for the plaintiff, with entire damages: two exceptions were moved in arrest of judgment; first, that a verdict cannot help what appears to be otherwise upon the fact of the record. Now, here the plaintiff declared, that he was imprisoned the tenth of August, 24 Car. 2. which was thirteen years before; and being one entire trespass, the issue is found as laid in the declaration; which cannot be for so many years between the cause of action and bringing of the writ; for if a trespass be continued several years, the plaintiff must sue only for the last six years (*c*), for which he hath a complete cause of action; but when those are expired, he is barred by the statute. Secondly, when the plaintiff has any cause of action, then the Statute of Limitations

(*a*) Run. Ejec. 444. (*b*) 3 Mod. 111.

(*c*) The plea in this case was bad, being "Not guilty within six years," whereas it should have been, "Not guilty within four years."

begins; as in an action on the case for words, if they be actionable in themselves, without alledging special damages, the plaintiff will recover damages from the time of the speaking, and not according to what loss may follow. So in trover and conversion, when there is a cause of action vested, and the goods continue in the same possession for seven years afterwards; in such case it is the first conversion which entitles the plaintiff to an action. So in the case at bar, though this be a continued imprisonment, yet so much as was before the writ brought is barred by the statute (*a*).

On the other side it was contended, that the verdict is good, for the jury reject the beginning of the trespass, and give damages only for that which falls within the six years; and this may be done, because it is laid *usque exhibitionem billæ.* If the defendant had pleaded Not guilty generally, then damages must be for the thirteen years, though the plaintiff, on his own shewing, had brought his action for a thing done beyond the time limited by the statute; but having pleaded "Not guilty at any time within six years," if the verdict find him guilty within that time, it is against him. Secondly, as to the objection, that the cause of action arises beyond six years, though it do appear so in the declaration, yet that doth not exclude the plaintiff, for there might have been process out before, or he might be disabled by an outlawry, which may now be reversed; or he might be in prison, and newly discharged; from which time he hath six years to begin his action; for being under any of these circumstances, the statute does not hurt him.

(*a*) 3 Keb. 613.

*Curia.*—If an action of false imprisonment be brought for seven years, and the jury find the defendant guilty but for two days, it is a trespass within the declaration. This statute relates to a distinct (*a*), and not to a continued act, for after six years it will be difficult to prove a trespass: many accidents may happen within that time, as the death or removal of witnesses, &c. Judgment was given for the plaintiff.

And trespass, with consequential damages, is within the statute, though it has not yet been settled whether the limitation be six or four years; but either way is well enough on general demurrer.

The plaintiff complained of a plea of trespass (*b*), and stated that the defendant, on 1st January 1792, and on divers other days, &c. at, &c. with force and arms made an assault upon G. the plaintiff's wife, and then and there seduced her, &c. whereby the plaintiff, during all the time aforesaid, lost and was deprived of the comfort, society, and fellowship of his said wife, and of her aid and assistance, &c. and other wrongs to the plaintiff the defendant did, against the peace, &c. and to the damage of the plaintiff of £20,000. Pleas; first, Not guilty of the premises; second, Not guilty of the premises at any time within six years next before the exhibiting of the plaintiff's bill. Replication joining issue on the first plea, and demurring generally to the second; joinder in demurrer.

In support of the demurrer it was contended, by Wood, that the Statute of Limitations could not be pleaded to an

(*a*) 3 Keb. 613. (*b*) 6 East. 389.

action of trespass for an assault and consequential damage, but that it was confined to trespass quare clausum fregit, or trespass for taking goods, which must be brought within six years after the cause of action, or to trespass for an assault and battery, &c. which must be brought within four years, and is confined to such actions brought by the party personally injured. That according to a MS. case of *Cooke* v. *Sayer* (a), with which he had been furnished, the Court, in deciding the demurrer to the plea of the Statute of Limitations, considered the action as an action on the case, and not of trespass, which was a mistake, and was so noted to be in *Batchelor* v. *Biggs* (b). He then read the following note :—" *Cooke* v. *Sayer* was an action brought by the husband against the defendant for criminal conversation with his wife. Plea, Not guilty within six years, to which there was a demurrer. The question was, if the action were trespass and assault, or case? If the former, the plea was bad, because it ought to be brought within four years; if the latter, it was good. *Curia*, without hearing any argument, this was an action on the case. If it were trespass and assault, the wife must have joined judgment for the defendant." Secondly, he contended, that supposing the Statute of Limitations was pleadable to such an action, the plea ought not to be, " Not guilty of the premises, &c. within six years ;" but that the cause of action did not accrue within six years, the gist of the action being the consequential damage, namely, the deprivation of comfort, &c.; as, if assumpsit be brought upon a promise to do an act at a future day, which was not then done, the plea cannot be, Non assumpsit infra sex annos but, Actio non accrevit infra sex annos. *Gould* v. *Johnson* (c).

(a) 2 Wils. 85. (b) 2 Blac. Rep. 855. (c) Salk. 422.

Scarlett *contra*, was stopped by the Court.

Lord Ellenborough, Ch. J. The cause of action in these cases, arises from the time of the injury done by the defendant by the corruption of the body and mind of the wife; for from that time she is less qualified to perform the duties of the marriage state. Then the question is, whether this be an action on the case, or an action of trespass and assault? And it is said, that the latter description only applies to personal assaults on the body of the plaintiff who sues: but nothing of that sort is said in the statute. No doubt that an action of trespass and assault may be maintained by a master for the battery of his servant, *per quod servitium amisit*; and so by a husband for a trespass and assault of this kind upon his wife, *per quod consortium amisit.* Then it is said, that the case of *Cooke* v. *Sayer* was decided on the supposition that it was an action on the case. It might be material to consider that point, if the question now were, whether the limitation of six, or of four years only, applied to this case: but if the defendant take the longer period, and plead Not guilty within six years, that, of course, must include that he is not guilty within four years: and the plea not having been specially demurred to, is therefore good in either way of considering it. I do not know what my opinion would have been if the point had now first arisen, whether to have considered this as an action on the case or trespass: but it having been considered in *Cooke* v. *Sayer* as an action on the case, I should be inclined so to consider it. But, whichever it be taken to be, the bar equally applies to it.

Lawrence, J. At any rate, it would be going too far to say, that there is no limitation whatever to such an action as the present; and if there be a limitation of it, it must either be of four or of six years: and then the objection to the plea is resolved into a mere matter of form, which cannot be taken advantage of on general demurrer. But upon the question, whether an action of this kind be trespass or case, besides the case of *Cooke* v. *Sayer*, and where, it is to be observed, that the plea was in the same form as the present, there was another case, of *Parker* v. *Ironfield*, in this Court, in Hil. Term, 19 Geo. 3. in which the declaration charged, that the defendant, on the 1st day of November 1777, and on divers days and times between that day and the exhibiting of the plaintiff's bill, made an assault upon Mary Parker, the daughter and servant of the plaintiff, and debauched the said Mary, and carnally knew her, whereby he was deprived of her service. And Mr. Justice Buller has written on back of his paper book, "This is an action on the case and not of trespass, and therefore 'divers days,' &c. proper." And then there is this further indorsement on the paper book, "Declaration for debauching daughter, that defendant on divers times, &c. assaulted, &c. good; for this is an action on the case: *aliter*, in trespass for assault." He therefore certainly considered it as an action on the case, and not an action of trespass and assault. But leave was then given to withdraw the demurrer, on payment of costs.

Le Blanc, J. I had donbted whether the case just mentioned was decided on the ground of the nature of the action, having myself a very short note of it. But

I considered that this was either an action on the case, or an action of trespass, within the Statute of Limitations; for it would be very singular if this were to be considered as trespass of such a kind as to be taken out of so beneficial a statute. And in either way of considering it, the plea is a good bar.

Judgment was given for the defendant.

## CHAP. VI.

### *Of the commencing and suing of Actions.*

THE statute requires that the several actions therein mentioned shall be commenced and sued within the time limited; but the legislature (*a*) purposely avoided mentioning the teste of writs, the exhibiting bills, the arresting, the holding to bail, summoning, serving, or any other form of process; but leaves to every Court to say, "what act of the party commences the suit;" and, after the limited time, forbids that being done.

In the King's Bench, by the general rule (*b*) and course of the Court, the filing of the bill is the commencing of a suit, and the bill of Middlesex, or latitat, but process to bring the party in; except where applied to avoid the Statute of Limitations, or a tender when these processes are considered as the commencing of a suit.

To a plea (*c*) of the statute, the plaintiff replied a latitat purchased a long time before, with the intention to declare in that action: and the Court held that he had, by that latitat, saved himself from being barred, for it was a commencing of an action in the King's Bench.

(*a*) Burr. 959. (*b*) Cowp. 454. (*c*) Sid. 52. Carth. 232.

But if the latitat be for a smaller sum than the damages laid, the Court will not intend it to be for the same cause, unless so stated.

In an action (*a*) on the case, &c. the plaintiff declared and laid his damages to four hundred pounds. The defendant pleaded the Statute of Limitations, "non assumpsit infra sex annos." The plaintiff replied, that he sued out a latitat to take the defendant two years before the action brought for £150. And upon a demurrer to this replication, it was insisted on the part of the defendant, that these were different actions; for no man would take out a latitat for £150. and delare ad damnum £400. It is true, if the plaintiff had averred it had been one and the same cause of action, it might have been otherwise; and so it was ruled by the Court.

But as a latitat, when sued out in vacation, is tested of the preceding Term, and therefore the action may appear to have been commenced within time, when, in fact, it was barred by the statute, the defendant may rebut this, by shewing the very day on which the latitat was taken out.

By Lord Mansfield (*b*). There never was a plainer proposition, conceived in plainer English words, than the rule laid down by this act of parliament. It enacts, "that all actions upon the case (other than such accounts as concern the trade of merchandize between merchant and merchant, their factors and servants) shall be commenced and sued within six years next after the cause of such actions or suit, and not after."

(*a*) 8 Mod. 109. (*b*) Burr. 950.

The statute is negative, and prohibits that which must be the act of the party; be the form as it may, the suing, commencing, or bringing an action, must be by some act of the party: and that is the thing prohibited, after the expiration of the limited time.

The preceding act of limitation, 32 H. 8. c. 2. computes the prescription from the time run before the teste of the writs therein mentioned: but because that would not be a true criterion of the time of commencing suits within the provisions of this statute of 21 Jac. 1. c. 16. the legislature has, in the latter (which professes to be made for quieting of men's estates and avoiding of suits), purposely avoided mentioning the teste of writs, the exhibiting bills, the arresting, the holding to bail, summoning, serving, or any other form of process; but leaves to every Court to say, "what act of the party commences the suit;" and, after the limited time, forbids that being done. The moment the six years expire, the prohibition attaches: the legislature says, "he shall not sue after that time." If the time expired in June, and he takes out his first process in October, the act done by him in October is prohibited, and against the law; for the statute says, he shall not sue after. If, by antedating the writ, he does sue after, then this effect of antedate is directly contrary to both the words and meaning of the act of parliament.

If so plain a thing can be made plainer, there happens to be a clause in the act which is decisive (*a*): "Sufficient amends may be tendered for an involuntary trespass before the action brought." Apply the argument to this clause, and the provision will be thus: "To prevent

frivolous and vexatious suits, there may be a tender of sufficient amends before the action brought: but by an implied reference to the course of the Court of King's Bench, the party may, after the tender, bring his action with an antedate, which shall over-reach and defeat the tender." And so the implied reference repeals the express text.

The statute did not intend to bar, unless the party had acquiesced six years. But he who sued out a latitat, to bring the defendant into custody that he might declare against him, did not acquiesce within the true meaning of the act; though artificially, the bill is, upon the record, the first step. The day he sued out the latitat he might have taken out an original: and any construction of the statute to make it bar one form of suing, while others were open, was nugatory, and contrary to its true intent. But to bring it within the equity of the law, the latitat must be taken out with an intent to declare in that action, and must be continued to filing of the bill.

When the replication of a latitat came to be allowed to save the bar, and prevent the running of the statute, because suing out a latitat was, in real truth, an act of diligence of the party, and the first step towards recovering his demand by the action depending (though in a strict legal sense, by the course of this Court, such action is not deemed to be brought till the bill is filed), it would be most extraordinary and most unequitable, not to allow this equity to be rebutted by the defendant, by shewing, "that, in real truth, the time was run before the plaintiff took any step." He was actually barred before he sued out the latitat; though, in form, by the course of this Court,

as the action is supposed to be brought later, the latitat is supposed to be taken out earlier, than the real truth.

Therefore, we are all clearly of opinion, that within the true meaning of the act of parliament, six years having expired before the latitat was in fact taken out, is sufficient to rebut the matter of the plaintiff's replication; which alledges, that although the suit was not brought within the six years, according to the course and legal notions of this Court, yet, in fact, it was brought within the time by suing out the latitat.

Second point—Whether the party may be permitted to shew that the latitat was taken out after the six years expired?

If the teste of a latitat was conclusive, wrong must necessarily be done, in many other cases as well as the present, and great inconvenience and absurdity would follow. No man, whose cause of action arose in the Vacation, could sue out this process till the next Term; which would be an injury to plaintiffs, and defeat the very end for which this practice was introduced. The defendant might be arrested long before the writ: he might be sued after he had made a legal tender, which would be a manifest injury to defendants. But the Court would not endure, that a mere form, or fiction of law, introduced for the sake of justice, should work a wrong, contrary to the real truth and substance of the thing: and they have, for one hundred and fifty years, uniformly held, "that where it became material to distinguish, they would consider the day when the writ was taken out as the substance, and the teste as the form."

In the case of *Pigot* v. *Rogers* (*a*), it was held, that a latitat bearing date before the bond upon which the action was brought, but returnable after, was right; because, says the Court, "the process always bears teste the last day of the Term before."

So in 3 Keb. 213. an obligation "not to prosecute before a limited time," was holden not to be broken by a latitat taken out after the time, though it was tested before: the reason given is, because the latitat is not suable with any other teste than of the preceding Term.

Where the arrest is before the actual suing out of the writ, it has been often determined that it cannot be justified; and that the day when it issued may be averred notwithstanding the teste is before the arrest.

The case of *Bilton* v. *Johnson and others* (*b*) was trespass and false imprisonment in London. The defendant pleads that J. S. sued forth a writ of latitat, the last day of Trinity Term, directed to the sheriff of R.; and by virtue of that, the sheriff of the said county made a warrant to the defendant, whereupon he took the plaintiff; (which is the same imprisonment) *absque hoc* that he is guilty in London, *vel aliter, vel alio modo*. The plaintiff replies, that the said writ was, in truth, prosecuted after the imprisonment, (to wit) on the 9th of August. Upon this the defendant demurs. And it was adjudged for the plaintiff; because, although the teste of the writ is upon record, and the plaintiff cannot aver against it, yet here will be great inconveniencies, if the plaintiff cannot set forth the very time when it was purchased, and the relation of the

(*a*) Cro. Jac. 561. (*b*) Raym. 161.

date to the last day of the preceding Term is only calculated to prevent fraud, but not to justify a tort.

And in the same case, Lord Ch. J. Kelynge is (*a*) reported to have said, that the time when a latitat is sued forth is traversable, and may be averred otherwise than according to the teste: which was agreed by the whole Court; for a relation shall not work a wrong. If a man be taken in the Vacation by warrant without writ, and a latitat be procured, tested in the preceding Term, it shall not discharge the wrong done after the teste, and before the actual taking out of the writ; but the plaintiff may take issue when it was prosecuted in truth.

In the case of *Hanway* v. *Merrey* (*b*), it was holden, that though a latitat may be taken out before the cause of action, yet the party cannot be arrested upon it till after; and in that case the Court discharged the arrest.

In the case of *Chauncy* v. *Rutter* (*c*), in trespass and false imprisonment, the defendant justified by arrest on a latitat. The plaintiff replied, that the writ was taken out after the arrest; to which replication the defendant demurred. *Et per Curiam*—The antedate of the writ will not suffice, if the proceeding be after.

So as to tenders. In the case of *Watts* v. *Baker* (*d*) it was holden, "that a tender came too late after an arrest upon a latitat." But the ground of that case implies, that if a tender was made before the latitat taken out in fact, the retrospective teste of the writ (which might be even before the cause of action) could not deprive the defendant of the benefit of that tender.

(*a*) 2 Keb. 198. (*b*) 1 Vent. 28. (*c*) 3 Keb. 213. (*d*) Cro. Car. 264.

In an action upon the case, where it is necessary to state the taking out a latitat, the party may declare that it was sued out such a day in the Vacation, bearing teste the last day of the preceding Term; or if the teste only be stated in the declaration, and the question should turn upon the precise day when it was taken out, the jury may find it. And this was adjudged (*a*) so long ago as the reign of Charles II.

The declaration alledged the latitat to be sued out of the Court on the 21st of January: the jury found that the teste of it was on the 28th of November, being the last day of the preceding Term; but that it was indeed sued out of the Court on the 21st of January, as the plaintiff had declared. The declaration was held to be good, because it was according to the truth of the fact, though the teste of a latitat must be of the preceding Term.

In the same case, reported in 1 Ventr. 362. it is stated, that a special verdict was found, "that the latitat bore teste the 28th of November, 32 Car. 2. but was really taken out the 21st of January following." Holt, who was counsel for the defendant, argued, that by law it must be deemed to be taken out the 28th of November, when the teste is. Lord Ch. J. Pemberton is reported to have given the rule in the following words: "We know the course of this Court is to teste latitats taken out in the Vacation as of the Term preceding: and the course of a Court is the law of a Court. The plaintiff might have declared, that he sued out a latitat the 21st of January, tested the 28th of November preceding; and if he be not estopped to declare so, surely the jury may find the whole matter." And so judgment was given for the plaintiff.

(*a*) Sir T. Jones 149.

Numberless are the acts of parliament in the Statute Book which give actions, "so as the suit be brought or commenced within one, two, three, or four months, or some longer time, and not afterwards." And many give actions to the party aggrieved, to be brought within two, three, or four months, and if the party aggrieved do not sue within that time, then to a common informer.

Notwithstanding the doubt in the case of *Culliford* v. *Blandford* (a), it is now settled, "that a latitat is a good commencement of a penal action:" and was so holden in this Court, in H. 22 G. 2. in the case of *Brydges* qui tam v. *Knapton*.

If the teste of a latitat was to be conclusive as to the time of suing, the time given by the legislature might be enlarged to double or triple the number of months. After expiration of the time given to the party aggrieved, the common informer might take out a writ: and then the party aggrieved might defeat his right after it had attached, by taking out a latitat with an antedate. By this mere form or fiction of law (which, for good purposes, gives the latitat an antedate merely as a matter of form), penal statutes would be rendered more penal; and men would be subject to penalties, to which, by law, according to the truth of the case, they are not liable. The plaintiff who sues upon any of these acts (which are very numerous), must take out the writ in fact within the time: the teste of the writ will not be sufficient. The act done by him, in commencing the suit within the limited time, is in the nature of a condition precedent to entitle him to maintain that action. If the legislature had not taken for granted, "that the true time of suing

(a) 4 Mod. 129.

out a writ might be shewn in opposition to the teste," it would have been absurd to have limited the time to one, two, or three months, followed by the negative words, "and not afterwards:" or, in default of the party aggrieved suing within such time, to give an immediate right to a common informer: and yet this is the form in which such acts are penned, from the beginning to the end of the Statute Book.

The act of 23 H. 6. c. 15. gives a penalty of £40. to the burgess chosen, and not returned, so as he sue for the same within three months; or to any other person who, in default of him so chosen, shall sue for the same. Suppose latitats were taken out upon this act by the party aggrieved, and also by many other persons, in the long Vacation, all bearing date the last day of Trinity Term, how could it be determined "who had a right to sue," but by shewing the true times when the writs were respectively prosecuted?

The 9 Anne, c. 14. gives an action to the person losing £10. at play, to be brought within three months; and if he do not sue within that time, then to any body else. There are a multitude of modern acts, down to the present session of parliament, penned exactly in the same way. I have been told, that at Nisi Prius it has been often ruled, in suits upon such statutes, "that the true time of taking out the writ may be shewn, notwithstanding the teste." The very penning of 8 G. 1. c. 19. is absolutely inconsistent with the notion of the teste being conclusive; because it says, the suit shall be brought before the end of the next Term;" which this doctrine would construe to mean, after the end of the next Term.

But there is one act in the Statute Book which alone would be decisive that the true time of suing out the writ may be shewn, and that is 5 W. & M. c. 21. s. 4. where (for preventing abuses by arresting persons without legal process) the officer is required to enter the very day when the writ is signed. But if the very day could never be shewn in pleading or evidence, it would have been most absurd to have provided a record from which it might appear. The statute does not enact that the teste shall not be conclusive, but takes it for granted that it is not.

It was due to the great and long litigation which this question has borne in Westminster Hall, to consider carefully every thing that has been said, and to look into every case and authority that has been quoted on the other side.—I have done so: and, upon the most minute examination, am not able to find any principle of law, determination, or authority, which contradicts the proposition I have endeavoured to prove, viz. that where the true time of suing out a latitat is material, it may be shewn notwithstanding the teste.

The arguments against allowing such an averment, are drawn from rules and cases, the reason of which is not the same, though they bear a seeming similitude in sound. No conclusion can be drawn from rules established in the case of a writ which ought to bear date the day it is sued out, and which may be quashed, upon motion, for irregularity, if it be antedated. I allow the maxim laid down in Plowden (*u*), and many other books, "that no man shall be allowed to plead or prove that such a writ was sued out on a different day from that on which it bears date." Plowden gives the reason:—Because contradicting the

(c) Plowd. 491. b. 492. a.

teste tends to discredit some judicial or other officer of record. But this only goes to the mode of redress: the false date does not finally conclude the party. His redress is in a summary way, by application to the Court out of which the writ issues: and therefore, in the Court of Exchequer, in the case of *the King* v. *Mann* (*a*), upon an extent, the Court inclined to disallow the plea, and set aside the writ, upon motion, because it was antedated.

But an averment, "that a latitat tested the last day of the precedent Term, issued in the Vacation, does not tend to discredit the officer;" for, by law, it may so issue, and ought to be so antedated. It cannot be set aside, upon motion, for irregularity; because it is right. The averment does not contradict the record, because, taking the course of this Court, together with the teste of the writ, it stands indifferent whether the writ was sued out the last day of the Term, or in the Vacation. And there is the difference between such a writ as this, and those that are intended by Plowden.

The reason why nobody shall be permitted to aver that a judgment was signed after the first day of Term, or that a fieri facias was taken out in the Vacation, is, because the fact is not relevant; the legal consequences do not depend upon the truth of the fact, on what day the judgment was completed, or the writ of fieri facias actually taken out, but upon the rule of the law, "that they shall be deemed complete and binding, to all intents and purposes, by relation."

The moment the law said, "Judgment shall bind purchasers only from the signing," it followed, that in the case of purchasers the time of signing might be shewn.

(*a*) 2 Str. 749.

If, to invalidate the writ, there was an averment that it issued on a day in the Vacation; there the inference would hold, from the case of a judgment, or fieri facias; and, to be sure, such an averment could not be allowed, because to that purpose the fact is not relevant; for by law, a latitat may issue in the Vacation, tested the last day of the precedent Term. Authorities, that a latitat is void if it bears teste out of Term (which is the case of *Buckridge* v. *Wright*)(a), prove nothing to the present purpose, because it is equally certain that it may be purchased out of Term, provided the teste be formal. The case of *Jones*, an attorney, v. *Burnet* (b), upon a writ of privilege, is not applicable. The Court there held the replication to be insufficient, but abated the writ; and the ground they went upon was, that it appeared, on the plaintiff's own shewing, that his writ bore date before his cause of action, though, in fact, taken out after. But they considered that writ in the nature of an original, and therefore abateable, if it bear date before the cause of action. Now, the direct contrary is the established law in the case of a latitat; for it may bear date before, if really prosecuted after, the cause of action.

The case of *Aldworth* v. *Hutchinson* (c) has been much relied upon, though it was never argued again. Judgment nisi is said to have been given for the plaintiff, and no cause shewn: but no judgment is entered on the roll. And there might be a very good reason to give judgment for the plaintiff, upon the true construction of the covenant. The words might very fairly take in all process as of that Term; especially a judicial writ, which must proceed upon a ground prior to the end of the Term. The

(a) H. 12 G. 1. B. R (b) P. 5 G. 2. C. B. (c) 1 Lutw. 329.

reporter, supposing the time of suing out the scire facias to be material, passes a strong censure upon the judgment, if it stopped the party from shewing the truth: for he says, "If such be the ground then, in judgment of law, a covenant may be broken when, in reality and truth, it never was broken: quod nota." And it would be well worth nothing, indeed, for no proposition could be more unjust.

* *

Upon the argument in this cause it was said, that Lord Hardwicke, in the case of *Hoare* v. *Yates* (*a*), was of opinion against the averment; and that Mr. J. Lee came over to that opinion; and that his Lordship was ready to have given judgment, when he was told the parties had agreed.

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I cannot form an opinion upon a point of law which would not be shaken by so great an authority: but his Lordship has been so good as to let me have his notes of the two arguments in that case before him. There is no notice taken, in his Lordship's own notes, of what might fall from himself: and it does not appear, from his Lordship's notes of what Mr. Justice Lee said, that he changed his opinion. His Lordship says, he believes he had not formed a conclusive judgment in his own mind; and that he certainly had made no preparation towards delivering it in Court. And he has been pleased to tell me, that he inclined to the opinions of Mr. Justice Page and Mr. Justice Lee (who were for admitting the averment in the defendant's rejoinder) against the opinion of Mr. Justice Probyn, who thought it could not be admitted by law. And we are all most clearly of opinion, that the averment

(*a*) P. 5 G. 2. B. R.

in the defendant's rejoinder ought by law to be admitted; consequently, the demurrer must be over-ruled, and judgment given for the defendant.

And in the Common Pleas (*a*), in an action of assumpsit for goods sold, to the statute pleaded, the plaintiff replied, that before the six years were out he brought an original in trespass against the defendant, with the intent to declare against him in assumpsit, according to the custom of the Court. The defendant said, that there was no such record; and the plaintiff produced an original in trespass, brought within the time, against the defendant and two others; and it was in trespass and assault in London; and it was moved, that this record did not make good the replication, for it was against three, and it should have been in a clausum fregit; for that was said to be the course of the Court to declare in any thing upon such a writ. No judgment was given in this case: but as to the suing of an original in trespass and assault, contrary to the custom of the Court, the Prothonotary informed the Court, that the original being in London, the Cursitor would not make a clausum fregit into London; and therefore, though in other counties that was to be, yet trespass and assault would do in this case; and such was the constant practice; and that it was not material though others were joined in the writ with the defendant; but the Court doubted of the practice.

And in the subsequent case of *Every* v. *Carter* (*b*), wherein the plaintiff declared on several promises, to which the Statute of Limitations was pleaded, the plaintiff replied an original, prosecuted against the defendant

(*a*) 2 Vent. 294. (*b*) 2 Vent. 259.

before the six years were elapsed. The defendant craved oyer of the writ, which was in trespass quare clausum fregit; and denied that the writ made good the writ mentioned in the replication. To this the plaintiff demurred; and the Court agreed that it was the practice then settled in the Court, to take out such an original in a clausum fregit, and to declare in assumpsit, or the like.

But (*a*) where the assumpsit was laid in one county, and the replication to the plea of the Statute of Limitations shewed a writ of clausum fregit brought within six years in another, the judgment of the Common Pleas, that this writ had avoided the Statute of Limitations, was reversed on error; and Holt, Ch. J. said, though such a writ of clausum fregit might be a sufficient process to bring in the party, and compel an appearance, yet it could not be an original to avoid the Statute of Limitations: that way of proceeding was to eradicate all the principles of law.

So, where a clausum fregit (*b*) in Dorsetshire was replied, to avoid the Statute of Limitations, in an action of assumpsit in London, in which the Court of Common Pleas gave judgment on demurrer for the plaintiff, which was afterwards reversed in error in the King's Bench, because the continuances of the writ did not appear.

Holt, Ch. J. in giving judgment, said, You say that it is the course of the Court, time out of mind. The question is, whether that must be granted; or, if it be contradicted, how it shall be tried? It cannot be by jury; therefore alledging or not alledging is not material: for

(*a*) Ld. Raym. 553. (*b*) 12 Mod. 570.

if it be the course of the Court, it is matter of law, of which we, as Judges, must take notice. Such a way has obtained, but the question is, whether such a course has efficacy enough to be a good ground for a declaration; and suppose, when the defendant comes in, and puts in bail, he demands oyer of the original, do you think it will be enough to give him oyer of the clausum fregit? And he asked here, could an original in Dorsetshire be a foundation for a declaration in London?

Error (*a*) was brought upon a judgment in the Common Pleas in indebitatus assumpsit, and the action laid in Leicestershire. The defendant pleaded the Statute of Limitations, and the plaintiff replied a clausum fregit in Derbyshire, sued within six years, to arrest the defendant; and when he was brought in to declare against him in assumpsit, according to the course of the Common Pleas, the defendant rejoined, that he did not assume within six years before the issuing of the clausum fregit; and upon issue thereon, a verdict was given for the plaintiff, and judgment accordingly, in the Common Pleas.

And upon the general errors assigned, Mr. Parker, for the defendant in error, argued, that supposing the clausum fregit was sued with intent to declare in another action, and was well continued until the time of the declaration in the said action, that will be a sufficient prosecution within the Statute of Limitations: and that, though in this case the clausum fregit was not continued, yet that will be aided by the verdict; which will distinguish this case from that of *Mois* v. *Brereton* (*b*), and of *Kinsey* v. *Hayward* (*c*), which cases were adjudged upon

(*a*) Ld. Raym. 880. (*b*) Ld. Raym. 553. (*c*) 12 Mod. 570.

the point of the discontinuance. That such a writ sued will avoid the operation of the Statute of Limitations; because the words of the statute are general, "shall be commenced and sued." If it had been said, that an original shall be sued, the objection here would have been strong; but now the sole question is, what shall be said the commencement and suit of an action? Whatsoever is a proper method to bring the defendant into Court to answer will be the commencement and suit of an action; because an action, in Co. Litt. 185. is defined to be nothing but *jus prosequendi in judicio quod sibi debetur*. That a clausum fregit is proper for that purpose, appears, first, because, if a man lives in one county, and commits a trespass in another; if he be sued by original in trespass, there ought to be an original, and a capias upon it, in the proper county; and then a testatum capias in the county where he lives; all which dilatory proceeding is saved by the suing of a clausum fregit at once; and by declaring against him in the proper county when he comes in. Secondly, if a man makes a contract in the Vacation, intending to run away immediately, if he be sued by original, he must be let go at large, because one cannot have an original but of the precedent Term, which will be before the cause of action. But now, by the help of this clausum fregit, one may arrest him presently, and declare against him in a proper action the next Term. The statute of 13 Car. 2. st. 2. c. 2. in the preamble, takes notice of these clausum fregits, that they were processes used in the commencement of actions. And the said course is confirmed in T. Jones 217. *Atkins* v. *Jay*. Besides, that there are other commencements of suits in the Common Pleas, than by original, as by bills of privilege. The true commencement of every action, in point of law, is a

proper original in such action; and therefore, strictly speaking, a clausum fregit cannot be an original, but in an action of trespass: but yet, if, by the course of the Common Pleas, a clausum fregit issues before the suing of a proper original in any action, and is used as process to bring the defendant in, and upon such clausum fregit he is arrested, &c. the suing of such clausum fregit will be a suing, and commencement of an action within the meaning of the Statute of Limitations; for it is equally a demand of my right. And what shall be, and what shall not be, a commencement of an action, must be determined by the course of the Court. And that is the reason, why a bill in the King's Bench is held as the original there, and the want of it aided by verdict by 18 Eliz. c. 14. within the words, "want of any writ, original," &c. Hob. 204. This statute has been expounded liberally, as to the saving the writ of the parties: therefore, it has been resolved, that where an action has been commenced by plaint entered in an inferior Court within these six years; and then the action has been removed by habeas corpus, and the statute pleaded; though the proceedings were here *de novo*, yet the entry of the plaint in the inferior Court was such a proceeding as would avoid the Statute of Limitations; and that the proceedings upon the habeas corpus were in some sort a continuance of the former suit. 1 Sid. 228. *Whitwith* v. *Hovenden*, and the case in 3 Lev. 245. is exactly a case in point. Then, he said, that the case of latitats in this Court were of the same nature; for they are issued for a supposed trespass, and when the defendant comes in, he shall answer in other actions. But the case of the latitat is the stronger case; for a latitat may bear teste before the cause of action, 1 Vent. 28.: and the bill of Middlesex in this

Court is never filed, and the latitat is the first process Dier. 118. Cro. Car. 264. So the clausum fregit is the first process in the Common Pleas, and always filed.

Objection: that there is no foundation for this averment, since there is no clause of *Ac etiam billæ* in it, as there is in latitats.

Answer. The same objection held in all cases of latitats before the 13 Car. 2. st. 2. c. 2. in compliance with which statute the said clause was inserted in latitats, as appears in 1 Keb. 598. and so it is at this day in all latitats, where special bail is not required. As to the matter of the discontinuance, he said, that it was aided by the verdict by the 32 H. 8. c. 30. And he cited several cases of defects aided by verdict, as Yelv. 129. *Kendrick* v. *Pargiter*; 1 Saund. 226. *Stennel* v. *Hogden*; 1 Lev. 196. Cro. Car. 240. the case of *Gidley* v. *Williams*; Raym. 634. Allen 32. Cro. Jac. 434. 2 Keb. 188. 230. the case in point upon a plea of a latitat.

*E contra*, it was argued by Mr. Cheshyre, for the plaintiff in error, that both cases cited by Mr. Parker, of *Mois* v. *Brereton* (a), and *Kinsey* v. *Hayward* (b), were adjudged upon this reason, viz. the originals were not proper in the said actions; and that this was worse than any of them, because this action was brought by executors, and the clausum fregit was for a trespass done to them in their own right, *quare clausum ipsorum fregit*: that the verdict would not help, because the original was improper, and therefore the issue void and immaterial; but in the cases cited of the other side the issues were proper.

(a) Ld. Raym. 553. (b) 12 Mod. 570.

Holt, Ch. J. said, that this case was not like the case of latitats in the King's Bench; because a latitat is an ancient process of this Court, and was a process of this Court at the time of making of the Statute of Limitations, and the use only to bring in a man in custody; and then they declare against him *in custodia marescalli marescalciæ.* But when a man is brought in by a clausum fregit in the Common Pleas, they do not declare against him *in custodia guardiani de la Fleet,* but upon an original proper for the action. And this practice of clausum fregit in the Common Pleas is new, and they have another way to sue there, viz. by original. But in the King's Bench, a latitat, in some actions, is the only way to commence the suit. North, Chief Justice of the Common Pleas, made a complaint of latitats in parliament, and the matter suffered great agitation in parliament; but at last the latitats were approved; as they are also by 27 Eliz. c. 8. which gives a writ of error in the Exchequer Chamber, but excepts errors to be assigned for want of jurisdiction in the King's Bench. Now, this being the process of the King's Bench at the time of the making of the Statute of Limitations, it must be understood to be comprised within the meaning of the act. And he said, he imagined, that after the reversal of the judgment of *Kinsey* v. *Hayward* (*a*) was affirmed in parliament, this point would never have been moved again. But farther, he said, here was a fatal fault, viz. that the plaintiff does not shew that the original was ever returned. Now, if he shews a writ, and does not return it, that will not avoid the Statute of Limitations.

(*a*) 12 Mod. 570.

And Powys and Gould, Js. agreed in all these matters with the Chief Justice Holt; and said, that in the case of *Culliford* v. *Blandford* (*a*), in the Exchequer Chamber, all the Judges there held, that a latitat was a kind of original in the King's Bench.

Powell, J. agreed with them, that the judgment ought to be reversed, for want of shewing a return of the writ. But as to the other point, he seemed to retain the opinion that he had given in the Common Pleas, in the case of *Kinsey* v. *Hayward*, when he was Judge there, viz. that the shewing of such clausum fregit will avoid the Statute of Limitations, as well as a latitat; alledging that a clausum fregit was the ancient process of the Common Pleas, and very useful to the subject in saving the fines due upon the original; which they never sue, if there is a verdict in the cause; but after a demurrer they sue it. The judgment was reversed.

In *Lethridge*, administrator of Richards, v. *Chapman and wife* (*b*), it was expressly adjudged, that within the reason of those cases before cited, wherein it has been holden, that a latitat was sufficient to avoid the Statute of Limitations, a capias in the Common Pleas was sufficient, without suing out an original. And in *Karver* v. *James*, Willes 258. it was agreed by all the Judges, on special demurrer, that a capias was a sufficient commencement of a suit.

In an action on the case (*c*), against persons acting under commissioners for paving by act of parliament, for raising the street in front of plaintiff's house, by which

(*a*) Carth. 232. (*b*) 15 Vin. Abr. 104. (*c*) 3 Wils. 461.

the passage and lights were obstructed, it became a question whether the action had been commenced in time. In order to prove the action to be commenced within the time limited by the act, a capias ad respondendum (issued out of the Court) was produced and read in evidence, and which appeared to have issued on the 15th day of December 1772, and was returned the 20th day of January 1773; and was sued out with intent to declare in the present action, upon the appearance of the defendants thereto, and upon such appearance, did declare against them: whereupon a verdict was found for the plaintiff, subject to the opinion of the Court upon the two following questions:—

1st Q. Whether the above action would lie against the defendants under the circumstances of the case?—2d Q. Whether the capias ad respondendum ought to have been read in evidence to prove the time of the commencement of the suit?

Serjeant Walker, for the defendant, contended that the capias ad respondendum ought to have been read in evidence, to prove the time of the commencement of the suit, because that writ is not the commencement of an action in this Court: the plaintiff ought to have produced and shewn in evidence to the jury the original writ, sued out within the time limited by this act of parliament; for she alledges, in her declaration, that the defendants, on the 1st day of June, and on divers days and times between that day and the day of suing forth her original writ, did the damage and injury she complains of; so, where the Statute of Limitations is pleaded to an assumpsit in this Court, and the plaintiff replies by shewing that a capias

ad respondendum was sued out within six years next after the cause of action accrued, it will not take it out of the statute.

Gould, J. If the capias ad respondendum be sued out within six months (as it appears to be), the original must be presumed to be sued out within six months, for it immediately precedes the capias.

Blackstone, J. The latitat is the commencement of the action in the King's Bench, and yet it supposes a bill of Middlesex to have issued before. I think the capias ad respondendum was very rightly admitted to be read in evidence to shew the commencement of the suit.

Serjeant Walker said, as the Court seemed to be of opinion, that the capias was properly admissible to be read to shew the commencement of the suit, he should go on to the other question, and endeavour to shew, that this action doth not lie against the defendant under the circumstances of the case.

Gould, J. I am very clearly of opinion that this action well lies against the defendant; that the action was commenced in due time, and that the capias ad respondendum was very properly read in evidence to prove the time of the commencement of the suit.

And by Lord Kenyon, at the Middlesex sittings, after Michaelmas 1788, in *Gosling* v. *Witherspoon*, If, to a plea of tender, or the Statute of Limitations, the plaintiff reply an original, sued out within the time, the production

of a capias ad respondendum, sued out within six years, is evidence of an original having been sued out, for the Court will presume it.

The commencement of an action in an inferior Court will prevent the Statute of Limitations from attaching upon the cause of action.

In *Bevin* v. *Chapman*, 1 Sid. 228. the Court of King's Bench held, that if an action be commenced in an inferior Court, and then removed by habeas corpus, and they proceed anew, that commencement serves to prevent the Statute of Limitations, which was recognized in *Mois* v. *Bruerton*, Raym. 553. The Court also held, that if a plaint be levied in an inferior Court within the six years, and then it is removed into the King's Bench by habeas corpus, and the plaintiff declares there *de novo*, and the defendant pleads the Statute of Limitations; the plaintiff may reply, and shew the plaint in the inferior Court; and that will be sufficient to avoid the Statute of Limitations.

So, where debt was brought in the Palace Court (*a*), and after some proceedings there, the six years expired; the defendant sued a habeas corpus, and removed the cause into the King's Bench, where the plaintiff declared *de novo*, and the defendant pleaded, that the cause of action did not accrue within six years before the teste of the habeas corpus; and this was held to be a good plea; but that the plaintiff might reply the suit below, and shew that to have been within the six years: not that this suit was a continuance of the suit below, but that the plaintiff

(*a*) Salk. 424.

had rightfully and legally pursued his right; and it should not be in the power of the defendant to defeat or hinder him of a remedy, without any default; as, where one brings an action before the expiration of six years, and dies before judgment, the six years being expired, this shall not prevent his executor.

Action upon the case (*a*) upon several promises; and the plaintiff declared, first, upon a promissory note of £12. 11s.; second count, upon an indebitatus assumpsit for £20. money lent; and third, for money laid out. To the first count, upon the promissory note, the defendant pleaded, that the cause of action did not accrue infra sex annos; and to the other two counts he pleaded non assumpsit generally; upon which issue was joined.

And as to the defendant's plea to the first count, the plaintiff replied, and admitted that the cause of action, did not arise within six years before his exhibiting his bill in this Court, but that it arose the 25th March 1720, and that, upon the 11th February 1725, in order to recover the money due to him upon that promise, he levied his plaint in the sheriff of London's Court, *in placito transgressionis super casum*; and avers that, *secundum consuetudinem civitatis præd'*, he there declared against the defendant in an action upon the case, and sets forth his declaration; which was, *eo quod* the defendant, such a day, *indebitat' fuit quer', in* £20. *pro divers. pecuniarum summis per præd' def. præfat' quer' prius debit*, which he promised to pay: then the plaintiff set forth, that the defendant hereupon brought his writ of habeas corpus, by virtue of which the said plaint was removed into this

(*a*) Str. 719.

Court, and the plaintiff declared against him *de novo;* and avers it to be *pro eadem causa actionis pro qua levavit querelam suam præd' et præfertur:* and then he avers, that the cause of action did accrue within six years before his levying the said plaint in the sheriff's Court, and therefore prayed judgment.

To this replication the defendant demurred, and shewed for cause, that it did not appear by the plaintiff's replication, that his bill against the defendant in this Court was for the same cause of action as that for which he levied his plaint in the Court below. Upon which there was a joinder in demurrer: and several exceptions were taken to the replication. 1st. That it ought to appear, either by the proceedings themselves, or by sufficient words of averment, that the cause of action is the same in both Courts; and in this case, it does not appear by any means upon the face of the proceedings, that the cause of action is the same in both Courts; for the declaration in the inferior Court is upon an indebitatus assumpsit, and the declaration here is upon a promissory note, which are causes of action manifestly different: nor is there any sufficient averment in the replication, to shew the identity of the cause of action in the two counts; for the words are only these, *quod* [the plaintiff] *exhibuit billam suam pro eadem causa actionis præd' ut præfertur,* which is not issuable; neither is it confined to the matter of the first count, as it ought to have been, but goes generally to the plaintiff's whole declaration in this Court. 2dly. The causes of action appear plainly to be different; because, the declaration in this Court being upon a promissory note, and the declaration in the Court below being upon an indebitatus assumpsit for a different sum, they cannot

be intended to be the same, for the promissory note could not be given in evidence upon the indebitatus assumpsit; and the two actions can never be intended to be the same, unless the same evidence will support both: and if they are different in their nature, no averment can reconcile them. 3dly. The plaintiff's declaration in the Court below appears to be ill; for he has only declared, by way of general indebitatus assumpsit, for so much money, *per præd' def. præfat' quer' prius debit'*, which is ill, because it does not shew a consideration, or how the debt arose; which is what is always required, that the Court may judge, whether it is a matter proper for such an action: and though this method of declaring may in some places be warranted by custom, yet, in all such cases, the custom ought to be set forth specially, and it is not sufficient to say *secundum consuetudinem* generally: as in Rast. Ent. 559. where *concessit solvere* is held to be well, by alledging the custom to declare in that manner, otherwise it would be ill.

Raymond, Ch. J. The actions in the two Courts are of such a nature, that they may be averred to be the same; for the statute 3 & 4 Anne only gives an additional remedy upon promissory notes, but does not take away the old one: and I think this note might have been given in evidence upon the indebitatus assumpsit; for the note imports the drawer's having so much money of the other's in his hands; and though it may not, perhaps, be allowed in evidence in such case as a promissory note, without further proof of the consideration, yet it may undoubtedly be given in evidence on an indebitatus assumpsit, as a paper or writing to prove the defendant's receipt of so much money from the plaintiff. *Hard's* case, Salk. 23. And

as the two actions may therefore be averred to be the same, so I take the averment to be sufficient and traversable; and the averment is confined only to the first promise, which is singled out by the word *quoad* in the replication, and closed as to the rest. As to the objection that is made against the declaration in the inferior Court, I think it of no weight; for though the declaration should be ill, yet, if the plaint be regular, it is sufficient to prevent the statute.

Reynolds and Probyn, Js. were of the same opinion.

But Fortescue, J. held strongly, that the two actions were of so different a nature, that they could not be averred to be the same. He agreed, that the variance in the sums did not prevent the averment of their being for the same cause; but he held strongly, that, since the statute, a promissory note could not be given in evidence upon an indebitatus assumpsit; and cited the case put by Hale, 1 Vent. 252. which is this; A, in consideration that B would marry his daughter, promised to pay £100. and in an action brought the plaintiff was barred; and in another action brought, the promise was laid to pay the £100. at request, and it was held it could not be averred to be the same. In the other points he agreed with the rest of the Judges; and said, that the form of declaring in the Court below was well enough: that it had been so adjudged between *Stephens and Greenland* (a) in this Court; and that the case in 4 Leon. 105. was in point.

Judgment for the plaintiff.

And if a man sue in Chancery, and pending the suit there, the Statute of Limitations attach on his demand, and his bill be afterwards dismissed, as being a matter properly determinable at Common Law, Lord Chancellor King said (*a*), that in such case he would take care to preserve the plaintiff's right, and would not suffer the statute to be pleaded in bar to his demand.

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When the action is commenced, it must be duly continued; and as the continuances are founded on the return of the first writ, care should be taken that such writ be in fact returned; for if the plaintiffs shew a writ, and do not return it, that will not avoid the Statute of Limitations (*b*): unless there be only one writ, and the plaintiff declare thereon within a year after it is returnable: he may, in that case, give the writ in evidence, without shewing it to be returned (*c*). But when there are two writs, the plaintiff cannot give them in evidence, without shewing the first to be returned (*d*).

It has been held (*e*), that a bill of Middlesex, returnable the same day that it sued out, is void, for that there could not be such a bill of Middlesex, and therefore would not avoid the statute; but in a subsequent case (*f*), wherein the bill of Middlesex was sued out on the 13th of February, returnable on the same day; for which reason a rule was obtained, calling on the plaintiff to shew cause why the writ and the subsequent proceedings should not be set aside on the authority of that decision. On

(*a*) 1 Vern. 74. (*b*) Ld. Raym. 883. Willes 257. (*c*) 2 B. & P. 157. (*d*) 6 T. R. 617. (*e*) Raym. 772. (*f*) 4 T. R. 610.

shewing cause against this rule, it was said, that whatever might have been the practice formerly, it was in every day's experience now, to sue out writs returnable as the present was; and that the Court had repeatedly refused to set aside such writs. The Court agreed that the practice was as stated by the plaintiff's counsel, and discharged the rule.

An attachment of privilege, if returnable on a general return day, is not void, but only voidable; and if it be returned and continued, will save the action.

In the case of of *Karver* v. *James* (*a*), it was objected, that the first writ was not good, because returnable on a common return day, whereas it ought to have been on a certain day, and therefore that all the continuances fell to the ground. And of that opinion was Mr. Justice Fortescue, A.: but the other Judges, viz. Willes, Ld. Ch. J. Mr. Justice W. Fortescue, and Mr. Justice Parker, held that it was only voidable, and not void: and that, therefore, if it had been returned, it would have supported the continuances; that it was voidable, and not void, and that the sheriff was obliged to return it, was holden in Poph. 205.; which is a stronger case than this, because there the capias was returnable on a *dies non juridicus*, namely, on All-souls day. If, therefore, the sheriff had returned this writ, it would have been well enough.

So, in *Leadbeter, executor*, v. *Markland, administratrix* (*b*), the Court, on the same point, said, that the writ was not made returnable on an impossible day, nor on the same day that it was tested, like that of *Green and*

(*a*) Willes 258. (*b*) Bl. 1131.

*Revet*, which, by the course of the Court, was equally impossible; but upon a known day, at a competent distance; contrary, however, to the strict rule of the Court, which requires such writs to be returned on some certain day, before or after such days of general return. That, therefore, it was no nullity, but a mere informality, which the Court, on application, would have amended. Besides, in *Green and Rivet* the writ was so ill pleaded, that it could not be clearly decided whether it was stated to be returnable on the day of the teste, or a year afterwards, both which were too absurd. And thought such an informal writ as the present was sufficient to bar the Statute of Limitations; since, had the cause proceeded, and the plaintiff recovered, and afterwards judgment had been stayed or reversed for this irregularity, the plaintiff, by sect. 4. of the Statute of Limitations, would have a year's time to proceed in a new action after the judgment so reversed: which shews the spirit of the Statute of Limitations to be, that a suit actually begun, however informally or irregularly, should be sufficient to stop the limitation.

It was said by Lord Holt (*a*), that upon pleading the Statute of Limitations, he always used to plead the return, and not the purchase, of a writ; for it was the return that gave the possession of the cause to the Court. And if one were to continue a latitat for several years, he must get the first returned; upon which return you make your continuances down, though you never take out another; but there must be a return to the first writ.

(*a*) 7 Mod. 5.

In replying, the plaintiff should shew that the cause has been regularly continued by *Vicecomes non misit breve*, from the return of the writ to the time of declaring. Where, indeed, the plaintiff has been guilty of an omission, or mere irregularity, the Court will interpose, and grant him an indulgence, for the sake of preserving the right of action; and it is on that ground that continuances are permitted to be added afterwards (*a*).

It was said by Twisden, J. (*b*) that he knew a latitat to be continued five years before the bill filed; the Secondary said, it might be continued seven. The continuances were considered a mere matter of form, and might be entered at any time; and it has been holden that they may be made by the attornies in their chambers (*c*).

But an attachment of privilege is not a continuance of an action commenced by a bill of Middlesex, so as to avoid the Statute of Limitations.

An action on the case (*d*) was brought upon promises, to which the defendant pleaded the general issue and the Statute of Limitations. The plaintiff replied, that within six years after the cause in the first count accrued, namely, on the 28th November 1785, the plaintiff sued out a bill of Middlesex against the defendant and one John Astle, for the same cause of action, returnable Monday next after eight days of Saint Hilary; that, on a return that those defendants were not found, another writ was issued, returnable Wednesday next after fifteen days from the day of Easter; that regular continuances were entered till Friday next after the morrow of All-

(*a*) 3 T. R. 662. (*b*) 2 Sid. 53. (*c*) 2 Sid. 60. (*d*) 3 T. R. 662.

souls; at which day the plaintiff appeared, and offered himself against the defendants in that plea; but the sheriff did not return the precept, nor did any thing therein; therefore the plaintiff, afterwards, on the 6th November 1789, prosecuted out of this Court against the defendant an attachment of privilege for the same cause of action, to which the defendant appeared, &c. And the plaintiff averred, that the bill of Middlesex first sued out and returned, and the several other writs, and the writ of attachment of privilege, were severally sued out with a view to exhibit his bill, or declare for the same cause of action as is mentioned in the first count. There was also a replication, as to the residue of the promises in the other counts, that the defendant undertook and promised, within six years before the exhibiting of the plaintiff's bill; on which last issue was taken. To the first replication there was a demurrer, and joinder.

On the trial, Lord Kenyon, Ch. J. said, it was true that if an action be commenced, though informally, to prevent the operation of the Statute of Limitations, it will have that effect if it be duly continued. But the question here is, whether the action were duly continued or not? The mode of continuing a bill of Middlesex, or latitat, is very familiar: it is in every day's practice. But here the plaintiff abandoned the proceedings on the bill of Middlesex, and sued out an attachment of privilege, which bears no analogy to the former proceeding. He was, therefore, clearly of opinion, that this was not a continuance of the former suit, and that the replication could not be supported.

Ashurst, J. In order to prevent the Statute of Limitations from running, it is absolutely necessary, not only that a writ should be sued out, but that it should be regularly continued. Where, indeed, the plaintiff has been guilty of an omission, or mere irregularity, the Court will interpose, and grant him an indulgence, for the sake of preserving the right of action; and it is on that ground we permit continuances to be added afterwards. But where it is admitted that the party has discontinued, he cannot sue out a writ of a different nature, and consider it as a continuation of the former action: he must pursue his action in the mode allowed by the Court.

Buller, J. The word "continuance" was so plain and simple, that it is not capable of two interpretations. When we speak of writs being continued, we mean, that it must appear upon record, that the Court has, from time to time, kept the original suit alive; and that the plaintiff is proceeding to bring the defendant into Court on the suit originally commenced: but it must appear on the record, that it was a continuance of the original writ. Now here a bill of Middlesex was sued out, which was continued down to a certain time, when that proceeding stopped, and then the plaintiff sued out an attachment of privilege, which was not a continuance of the former writ, for it has no connection with it. The cases from Shower and Barnes were cited to shew that an attachment of privilege was only as a latitat, and not as an original writ: but that proves that it is not a latitat; for *nullum simile est idem.* With respect to the instances put of a person becoming a member of parliament, or an attorney, after he is sued, it will be time enough to decide the

former when it occurs; but the latter is too clear to admit of a doubt; for he cannot avail himself of the privilege which is conferred on him after the action is brought: and if, in such a case, he were to plead his privilege, the plaintiff might reply, that the writ was sued out against him before he became an attorney.

Grose, J. The Statute of Limitations enacts, that all actions upon the case, &c. shall be commenced and sued within six years next after cause of action: but this suit was not commenced within that time; for a bill of Middlesex, and an attachment of Privilege, cannot be said to be one and the same suit.

Judgment was given for defendant.

What has been said with respect to the returning and continuing the process, which the plaintiff relies upon as the commencing of a suit, applies to the proceedings in the Common Pleas. And in that Court, in the case of *Stratton* v. *Savignac*, the Judges were clearly of opinion, that the mere circumstance of process sued out was not sufficient, since probably it might be for some other cause of action; and if allowed to operate in the way contended for, would open a door to much inconvenience, by enabling persons to keep such process in their pockets till such stage of the proceedings as they should be disposed to bring it forward (*a*). And the method is, to return *non est inventus* on the first writ, and then to continue the writ by *Vicecomes non misit breve.* But as to the necessity of shewing the return and continuances, there seems to be a difference with respect to originals

(*a*) Willes 258.

proper for the action, and the common clausum fregit: in the former case it has been held not necessary to shew the return and continuance, but in the latter it is always so.

In an action of trespass (*a*) for taking cattle, plea, the Statute of Limitations, the plaintiff replied an original; to which there was a demurrer, and two causes assigned; the last of which was, because he did not plead the continuances upon the roll. Maynard, counsel for the defendant, answered, that it was not necessary to shew, in the plea, all the continuances, but to plead so much of the record as went in bar. By Roll, Ch. J. the plea is plain; and it is not necessary to alledge all the continuances, for here is an appearance.

To an action of assumpsit in the Common Pleas (*b*), and the statute pleaded, the plaintiff replied an attachment of privilege, and that defendant did make such promise within six years next before the suing forth the said writ of privilege; to which the defendant demurred, because it did not appear by the replication when the attachment was returnable, nor that it was ever delivered to the sheriff, nor returned; and that four Terms intervened between the teste thereof, and the Term the declaration was of, and therefore there ought to have been continuances of this writ of privilege. But the Court of Common Pleas were of opinion, that an appearance to process cures all errors and defects therein, and gave judgment for the plaintiff below.

(*a*) Styles 373. (*b*) 1 Wils. 167.

A writ of error was brought upon this judgment, and the general errors were assigned. For the defendant in error it was argued, that an attachment of Privilege in the Common Pleas is in nature of an original writ; and if an original writ is replied to the plea of the Statute of Limitations, it is sufficient to shew the teste of it when issued, without any continuances, according to the case of *Whitehead and Buckland*, Styl. 373. 401. But if a latitat, or a common clausum fregit, be replied, it must be shewn that it was continued properly to make it the foundation of the suit. Carth. 234. And of that opinion was the Court, after time taken to consider; and the judgment was affirmed.

But since this case in Style, and before that in Wils. the rule has been otherwise.

In *Kinsey* v. *Hayward* (a), Holt, Ch. J. said, Suppose you had pleaded a right, and a proper original, in this manner, as you have done here, you have not shewn that it ever was returned; and till return there is no day in Court; and there is no continuance shewn to have been entered: and to prevent the statute it is not enough to take out a writ, even a proper one, but all the continuances, though for six or seven years, must be entered, and so shewn to the Court; for if there be an omission of one continuance, it spoils all. And for the discontinuance only was the judgment in the Common Pleas reversed, which judgment was affirmed in parliament.

In *Brown* v. *Babbington* (b), where the principal objection was to the writ being properly a commencement of

(a) Lutw. 160. (b) Ld. Raym. 881.

the suit within time, Holt, Ch. J. said, that there was a fatal fault, viz. that the plaintiff did not shew that the original was ever returned. Now, if he shews a writ, and does not return it, that will not avoid the Statute of Limitations.

And in *Karver* v. *James* (*a*), because the first writ (which was a writ of privilege) was not returned, all the continuances were void.

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Where the action was commenced by original, and abated without the default of the plaintiff, he might have another writ by journies accounts; but this is never now resorted to to save the action, such a case being always within the equitable construction of the fourth section of this statute.

Indebitatus assumpsit (*b*) for an assumpsit to the testatrix. The defendant pleaded, non assumpsit infra sex annos. The plaintiff replied, that Charles Elstob was executor to Jane Elstob, *durante minoritate* of the plaintiff, and that he sued an action within six years, &c. against the defendant; and that pending the action, the plaintiff came of age, and brought this action by journies accounts. The defendant demurred. And after several arguments at bar, it was resolved by the Court—

1st. That if Charles Elstob had been administrator to Jane Elstob *durante minoritate* of the plaintiff, and had brought an action, pending which the plaintiff had come

(*a*) Willes 255. (*b*) Ld. Raym. 283.

of age; he could not have continued that by journies accounts, because he would not have come in in privity to Charles, but he had claimed immediately from the ordinary; and in such case the Statute of Limitations would have been a bar to the plaintiff, as it was adjudged in a case in the Common Pleas about four years before; where an administrator brought an action upon the brink of the six years, and pending that died; upon which the next administrator *de bonis non* brought another action, in which the Statute of Limitations being pleaded, the plaintiff replied, and shewed all the special matter, how the former administrator brought an action, &c.: and it was adjudged that that could not aid him, because he did not come in in privity to the former administrator.

2dly. That this action was recently enough brought, for it appeared that it was brought within seven days after the plaintiff came of age. Heretofore they used to allow half a year to bring an action by journies accounts, but now that is held to be too long, and therefore they allow but thirty days.

3dly. That this executorship being but an office, both persons make but one executor, and therefore the plaintiff was privy to Charles, and to the writ sued by him. See Owen 134. Co. Entr. 923. Hob. 265, 1 Roll Abr. 921, 11 Vin. 227. pl. 15,

And by Treby, Ch. J. If Charles had obtained judgment, the new plaintiff, after his being of age, might have sued execution. But it was resolved, that if A. makes B. his executor, adding, that if he does such an

act, C. shall be his executor; if B. bring an action, and then does the act, C. cannot have an action by journies accounts, &c. because B. has determined his office by his own act; and though he was once sole and perfect executor of himself, yet, by the breach of the condition, he is now as if he had never been executor, and C. is not privy to him.

But in a subsequent case, wherein the law respecting the maintaining of writs by journies accounts was much discussed, a different construction was held. The question was, as to the propriety of the first writ, and if that writ could be maintained by journies accounts. The Common Pleas held, that the first writ being shewn to be sued out, it should be intended to be returned and continued. But the Court of King's Bench, on error brought, reversed the judgment for want of continuances to the first writ; and the judgment of the King's Bench was affirmed in parliament.

The case was thus: The plaintiff (*a*) declared as administrator to her husband, against the defendant, as executor to Heyward, in indebitatus assumpsit. The defendant pleaded, non assumpsit infra sex annos. The plaintiff replied, that her husband sued out a writ of clausum fregit returnable in this Court, in which he intended to declare in assumpsit for this debt against Heyward; that Heyward died, and her husband sued another writ against the defendant; that then her husband died, and she being administratrix to her husband, sued this writ, &c. The defendant demurred: and the Court gave their opinions

(*a*) Ld. Raym. 435.

in solemn arguments on the Bench: but the argument of the Chief Justice only is reported.

Treby, Ch. J. 1st. In this case this writ is not maintainable by journies accounts; for a writ by journies accounts is maintainable only by the same plaintiffs, or one of them at least, who sued out the first writ: but where the plaintiff dies, a writ by journies accounts cannot be brought by his executor, &c. And this appears by the terms of the law, Fitzherbert and Stratham, in title Journies Accounts—If the defendant dies, there the plaintiff may pursue a writ by journies accounts against his executors, &c. or if there are two plaintiffs, and one of them dies, the survivor may have such a writ, he being the same person who sued the former writ; but a writ by journies accounts is maintainable in no case but by the same plaintiffs, or some of them, who were plaintiffs in the former writ; but in no case shall be brought by an executor, or heir, &c. Rast. 107. 108. 417. 3 Cro. 174. Bro. Journies Accounts. 23 Thelsal 407 b. 1 Ventr. 235. And without doubt, there have been several occasions offered to bring such a writ by executors, &c. which would have been brought, if the law would have allowed it. And the case of *Elstob* v. *Thorowgood*, adjudged in this Court, Mich. 9. Will. 3. A general executor brought a writ by journies accounts upon a writ brought by the executor *durante minoritate*, and adjudged that the said writ was well brought. And he said, that he was then of the same opinion; but he never was ashamed to retract his opinion, when he is convinced upon better reason; and for this reason he declared, that he thought the said judgment was not maintainable upon the reasons upon which it was given, viz. that an executor may have a writ

by journies accounts upon a writ abated, brought by the executor *minoritate;* but the judgment, notwithstanding, well given upon other reason. But in no case can a writ of journies accounts be, but by the same plaintiffs, or some of them, who were plaintiffs in the former writ. And to say that the general executor, and the executor *durante minoritate*, were as one person in the office, is to strain the point too far; for it must be the same plaintiff, not only by representation, but by name; for the second writ is a continuance of the first; which cannot be but by the same person, not only in representation, or in respect of their office, but strictly and truly the same person.

2dly. In this case the writ cannot be by journies accounts, because the former writ ought to be continuing in Court and returned. Fitzh. Journies Accounts. 22 Rast. Entr. 417. 11 H. 6. c. 34. For the writ is not in Court before it is returned; but, in this case, it does not appear that the first writ was returned.

3dly. In this case the first writ was a clausum fregit, which writ is not maintainable, nor can be continued against executors; and the second writ ought always to be the same as the first; and usually they were entered upon the same roll, and both together made only one record.

4thly. In this case there is nothing of journies accounts before us, for the second writ is not said to be brought *per dictas computatas*, as all the precedents are; though the meaning of the said words he did not well apprehend, The word *dieta* signifies a day's journey, and the best

account of the word is given by Selden; that the Chancery being a moveable Court, and following the King's Court, and the writs being to be purchased out of the said Court, the party who purchased the second writ ought to have applied to the King's Court as hastily (that he might obtain the second writ) as the distance of the place would allow, accounting twenty miles for every day's journey; and for this reason he was to shew in the second writ, that he had purchased his second writ as hastily as he could, accounting the days' journies he had to the King's Court. It has been urged by the counsel, that the death of the plaintiff being the act of God, shall not do a prejudice to any; and the executor of such person dying ought not to be prejudiced by the testator's death, to lose a writ which was well commenced. Answer, that the said rule, viz. *quod actus Dei nemini facit injuriam*, admits of several exceptions, and it will prejudice the party in divers cases. The Statute de bonis asportatis, &c. is an instance; for at Common Law, before the said statute made, by the act of God executors were prejudiced in quare impedits; and in all actions and cases where damages only are recoverable, which arise *ex delicto*, unless in cases which arise upon deeds or contracts. A pawn is not redeemable after the death of the pawnor. In appeal the next heir dies after the appeal brought, the appeal is lost. And, for this reason, the said rule will not support this writ by journies accounts.

And in the case of *Hayward and Kinsey*(a), Holt, Ch. J. observed, that as to the journies accounts, the plaintiff's intestate brings an action within six years; and it is proceeded, and pending it the plaintiff

(a) 12 Mod. 571.

dies, and the six years are elapsed in the interim, it were reasonable that the administrator might have another action within convenient time, and have benefit of the first action for the preservation of the right against the statute, as the practice has been in cases of outlawry. But if an heir in tail bring a formedon within five years after a fine levied by a third person, who is not his ancestor in tail, but a discontinuee for the purpose, and pending it, and after the five years, the issue dies, whether the next heir in tail shall have benefit of this formedon, by bringing a new one in convenient time? It were reasonable he should, but this has not been determined. And it is plain journies accounts will not lie in this case; for the rule is, that it must be between those that were parties to the first writ. And besides, the new writ is to be the same with the former; and the writ that lay for the ancestor or for the testator is not the same that lies for the issue or executor, but one of another nature. If an assise be brought within twenty years after a disseisin, and before judgment twenty years pass, and then the demandant dies, the heir cannot have another assise, but he must have a writ of entry; and it will be hard to prove the heir can proceed by journies accounts in that case; for it is another writ he is entitled to now by the death of his ancestor; yet still he may be out of the Statute of Limitations.

## CHAP. VII.

### *Of the Fourth Section.*

THE time within which actions are, by the third section, directed to be brought, is enlarged by the words, and by an equitable construction of the fourth section, which enacts, "that if, in any of the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alledged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill; or if any the said actions shall be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry; that in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit, from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after."

The plaintiff declared in the Common Pleas (*a*) in assumpsit, supposing, that the defendant, 16 Jac. 1. at Bury, in Suffolk, promised to pay, &c.

(*a*) Cro. Car. 294.

After verdict and judgment upon non assumpsit pleaded and found for the plaintiff, the defendant brought error; and upon diminution alledged, the original was certified to be in Hilary Term, 4 Car. 1. upon which the plaintiff in the writ of error pleaded the Statute of Limitations; and that the action, being upon a promise in 16 Jac. 1. and not brought within six years after the promise, nor within three years after the statute, was not maintainable. The defendant pleaded, that he, 2 Car. 1. which was within three years of the statute, brought a writ original of assumpsit, supposed to be made in Kent, against the defendant, now plaintiff in the writ of error, wherein he was outlawed; but in 3 Car. 1. the outlawry in the Common Pleas was declared void, and he discharged; and that within a year after he brought this action, and supposed the promises made at Bury to his damages of £600.; and that, in the former action, the assumpsit was alledged to be made in Kent to his damage of £500.; and he averred that it was one and the same promise and cause of action. Upon this plea the plaintiff in the writ of error demurred.

Twisden shewed the cause to be, for that this new action varied in the county from the assumpsit, and in the damages alledged, and so could not be intended one and the same cause of action, nor to be a new suit begun for the same matter.

Also, Croke, J. conceived, that forasmuch as this outlawry was not reversed by error, but avoided by plea, the first original was not determined, but he might have proceeded thereupon; and then, to begin a new original,

and in another county, is not according to the Statute of Limitations, nor within the intent of the statute.

But Richardson, Jones, and Berkley, held, that this variance of the county and damages was not material to the action, being transitory, and averred to be for one and the same cause: and although the outlawry is not reversed by a writ of error, but avoided by plea, it is all one within the intent of the statute; for the statute is not where the outlawry is reversed by error, but where the outlawry is reversed, so it is by any means. Therefore, upon their three opinions, a rule was given that judgment should be affirmed.

So, in trespass for taking and detaining plaintiff's beasts till a fine was paid (*a*), and the action laid in Sussex; the defendant pleaded, that the cause of action did not accrue within six years before suing of the writ; and the plaintiff replied that at another time he brought an original in battery in London, intending, when the defendant had appeared, to have declared for this trespass; and that the defendant was outlawed in London; and that, within such a time after the reversal of the outlawry, he declared here: to which the defendant demurred; and it was insisted, that the original being laid in London, the plaintiff could not in this action declare in another county, though the cause of action be transitory. But, upon information by the Prothonotaries that the course of the Court was, that although the original be laid in London for expediting the outlawry, yet, when the defendant comes in, the plaintiff may declare against him in another county, be the action local or transitory: and the Statute of Limi-

(*a*) 3 Lev. 245.

tations giving to plaintiffs generally a power to commence a new suit within the year after the outlawry reversed; that so he may do in that case to warrant his declaration within the course of the Court. Judgment was given for the plaintiff.

But where, to an action on the case by an executrix (*a*), for money lent by the testator, &c. the defendant pleaded the Statute of Limitations; and the plaintiff replied, that the testator filed a special original in trespass upon the case, against the defendant, setting forth the whole declaration; and that, *pendente placito*, her husband died. And upon demurrer, the question was, whether this action, brought by the testator by original, be within the equity of this section of the Statute of Limitations?

In this case the action was brought by original by the testator, but he died before the defendant could be outlawed; and it was held that his executrix could not maintain this action within the year: but it was a hard case, and the statute had not provided for it.

This has, however, been since over-ruled: and in cases wherein the progress of the action has been arrested by the death of either of the parties to the suit, a reasonable time has been allowed, within which a fresh action may be brought.

In an action (*b*) wherein the plaintiff declared as administratrix against the plaintiff as executor, on a promise to the intestate by the testator, the defendant pleaded the Statute of Limitations. The administratrix replied, that

(*a*) Nels. Abr. 82. (*b*) Ld. Raym. 434.

the intestate sued a writ of clausum fregit, returnable in the Common Pleas, in which he intended to declare in assumpsit against the defendant's testator; that the testator died, and that the intestate took out another writ against the defendant; that intestate died, and plaintiff being administratrix, sued out this writ; to which was a demurrer: and the question was, if such writ could be maintained by journies accounts?

Treby, Ch. J. in giving judgment said, That which is said by Coke, 6 Rep. 10 b. Spencer's case, is law; that an executor, &c. shall not have a writ by journies accounts. But though this writ is not good to continue the former, and by such means to avoid the Statute of Limitations, yet, the plaintiff here ought to recover notwithstanding the said statute pleaded. For the statute is, that actions upon the case, &c. shall be sued within the six years, &c.: and for this reason, where an action is sued within the six years, that seems to be excepted out of the words of the statute; and that if an action is sued within the said time, the party is out of the proviso of the act, and at liberty to prosecute the said action, or to sue another action, at any time not restrained or limited by the statute. And in this case an action was commenced within the six years, though the former was a writ of clausum fregit, and this is an assumpsit, yet, by the course of the Court it is the same action; the clausum fregit being a general writ, upon which a man may declare in any other personal action, as a latitat in the King's Bench. And therefore the statute is satisfied in this case by the suing of the clausum fregit, and the plaintiff thereby set at liberty out of the

restraint of the said statute. And if a copyholder has licence to make a lease, his lessee may make an under lease; for, by the licence, it is exempt from the custom of the manor. 1 Roll. Abr. 508. pl. 14. 6 Vin. 120. pl. 5. But though, by the suing of an action, the party seems to be set at liberty, without any restraint of time in which he ought to prosecute his action, or to bring a new action, yet, by the reason of the statute, he ought to be restrained to some reasonable time: for the statute being made for setting some time for the bringing of actions, it ought to be expounded according to such intent; and where the words are silent, a reasonable time by construction ought to be made. But it is difficult, in this case, to settle in what time an action shall be brought, where another action hath been commenced within the six years. But it seems to me, a year ought to be a reasonable time; for it is the time in which the law delights, as may be instanced in many cases. Co. Litt. 254 b. 2 Inst. 476. Plowd. 353. *Stowell and Zouche's* case. For though the statute binds the right of the party, and therefore ought to be taken strictly, yet the party shall be bound to some reasonable time; and a year being the time which the law, in many cases, adjudged reasonable (see 2 Keb. 764.) therefore, in his opinion, if a writ be brought within six years, although it be discontinued by death, &c. and the six years expire, yet the Statute of Limitations will not be a bar, if another action be commenced in reasonable time; and a year shall be said a reasonable time.

And the time will not be enlarged, except under special circumstances.

Case (*a*) by the executor of the executrix of George Wilcox against the defendant, upon a promissory note, dated 30th July 1719. The defendant pleaded, *quod causa actionis non accrevit infra sex annos.* The plaintiff replied, that the first executrix, Trin. 11 Geo. 1. sued out a bill of Middlesex against the defendant, returnable Mich. sequen. on which there was a continuance by *non misit breve*; and an alias was taken out, returnable in Hilary Term following, before which the executrix died, and made the plaintiff her executor; who, in Michaelmas Term, 3 Geo. 2. sued out a latitat against the defendant, with intent to declare against him as above, which he accordingly did; and concluded with an averment, that the cause of action accrued within six years before suing out the first bill of Middlesex. To this the defendant demurred: and after several arguments, it was held, that the replication was ill, there being four years between the death of the first executrix, and the proceeding, by the new plaintiff: that the most that had ever been allowed was a year, and that within the equity of the proviso in the statute which gives the plaintiff a year to commence a new action, where the judgment is arrested or reversed: but they said they would not go a moment farther, for it would let in all the inconveniencies which the statute was made to avoid. Indeed, if the second executor had been retarded by suits about the will or administration, and he had shewn that in pleading, it would have been otherwise, because then the neglect would have been accounted for. And wherever a suit is allowed to be continued by journies accounts, it must be a recent prosecution (6 Co. Spencer's case), which this can never

(*a*) 2 Str. 907.

be said to be. *Per Curiam.*—Judgment for the defendant.

No precise time, indeed, seems to have been fixed; but, in the report of the above case in Fitzgerald, Lee, J. said, I think it should be in the nature of journies accounts, which is taking up and pursuing the old action in a reasonable time; which is to be discussed by the direction of the Justices, 6 Co. Spencer's case. And by the same rule, I think what is or is not a recent prosecution in a case of this nature is to be determined by the discretion of the Court, from the circumstances of the case: but, generally, the year in the statute is a good direction.

And it has been held, that an action by original, brought by an administratrix within six years after the cause of action accrued, would enable the administratrix and her husband (whom she afterwards married) to recover in an action by bill by both, notwithstanding a plea of the Statute of Limitations.

*Broderick Lord Viscount Middleton* v. *Forbes and wife* (a); error in the Exchequer Chamber. On the pleadings the case was this. Forbes, and Eliza his wife, administratrix of John Couchmaker, her late husband, brought their bill in the King's Bench against the defendant (the plaintiff in error) for monies laid out by the intestate. The defendant pleaded non assumpsit, and non assumpsit infra sex annos. The plaintiffs replied, that Eliza, when a widow, ss. on the 2d January, 18 Geo. 2. brought her original writ, and before the return she married Forbes;

(a) Willes 259. in notis.

and they recently afterwards, 14th January, 19 Geo. 2. exhibited their bill against the defendant. The defendant rejoined, that Eliza married T. Jekyll, who was alive on the 5th June, the time of issuing the original. The plaintiffs sur-rejoined, and tendered an issue; to which the defendant demurred.

Upon judgment given for the plaintiff in the King's Bench, without any argument, a writ of error was brought in the Exchequer Chamber: where Ford, for the plaintiff in error, argued, that the suit was abated by marriage, the voluntary act of the party: that the statute 21 Jac. 1. c. 16. s. 4. was a law of peace for the security of property, and ought not to be extended by construction. 1 Lev. 31. 1 Lutw. 261. 6 Co. 9, 10. Besides, a suit commenced by bill cannot be continued by original.

For the defendants in error it was insisted, that there was no discontinuance; that the new suit was brought within a reasonable time, namely, within two Terms, whereas it has been holden that a year is a reasonable time. *Hayward* v. *Kinsey*, 1 Lutw. 256. 1 Ld. Raym. 432. 2 Inst. 476.; that the Statute of Limitations ought not to receive a literal, but an equitable, construction. 2 Saund. 120.; 2 Mod. 71.; and 1 Lev. 31. As to the commencement of the suit by original, and the suit afterwards by bill, the reason for it is evident: then the defendant was in custody of the marshal; and being in such custody, the plaintiffs could only proceed by bill. It is also observable, that this is a suit *jure alterius*, and not *in jure proprio*.

By the Court.—The statute has received a favourable construction. The suit was originally brought within the six years, and the new suit within two Terms. No disability can be pleaded to an administratrix: and the statute does not bar the action; it only takes away the remedy. T. 5 Geo. 2. B. R. *Wilcox* v. *Huggins*. P. 9 Geo. 2. B. R. *Usherwood* v. *Nevill*. Salk. 454. And the judgment of the King's Bench was confirmed by all the Justices and Barons. MS. Abney, J.

And a capias taken out by the executor of an attorney will enable him to maintain a suit commenced by attachment of privilege. But although these actions, maintained upon that previously commenced and abated, are not required to be brought by those only who could maintain the writ by journies accounts; nor that the same process should be used; nor even that the previous action should be carried on in the Court in which the subsequent one is commenced; yet, to maintain such subsequent action, the former one, be it commenced as it might, or in whatsoever Court, should be commenced according to the form of that Court, and be duly continued there.

Therefore, in an action upon promises (*a*), to which the defendant pleaded the Statute of Limitations, the plaintiff replied, that his testator, who was one of the attornies of Common Pleas, on the 26th of April, in Easter Term, 5 Geo. 2. sued out a writ of privilege against the defendant, to answer him in a plea of trespass on the case on the morrow of the Holy Trinity then next; but that

(*a*) Willes 255.

the sheriff of Herefordshire (to whom it was directed) did nothing thereupon, nor did he send back the said writ; therefore the plaintiff's testator sued out another writ, &c. returnable in the then next Michaelmas Term, &c.; and so on twenty other writs of the same kind, stating them, and the days they were returnable; but it stated that neither of them had been returned by the sheriff, and it did not state that any one of them had ever been delivered to him: that before the return of the last writ, namely, on the 28th of July 1737, B. Karver (the plaintiff's testator) died; recently after whose death the plaintiff sued out the writ (a capias) in this case, in Trinity Term, 11 & 12 Geo. 2. for recovering the damages by reason of the not performing the several promises in the declaration mentioned; that the several writs of privilege so prosecuted by B. Karver in his life-time against the defendant, were prosecuted by him with an intent to have impleaded the defendant of and upon the several promises in the declaration specified; and that the writ so prosecuted by the plaintiff against the defendant, was prosecuted against him with intent to implead him for the cause of action in the declaration specified; and upon his appearance, to declare against him for the said several causes of action; and that he (the plaintiff), according to his said intention, afterward, on, &c. declared against the defendant here, &c. with an averment, that the several causes of action accrued within six years before the suing out of the writ of privilege first above specified by B. Karver, &c.

To this replication the defendant demurred specially, and shewed for cause of demurrer, that the writ of

privilege first above specified was void for want of a sufficient return, &c.

And of such opinion was the Court, and the defendant had judgment.

## CHAP. VIII.

### *Of the Proviso contained in the Seventh Section.*

HAVING considered what acts of the party plaintiff prevent the statute from attaching on his cause of action, we come next to the cases excepted by the legislature out of its operation by the seventh section. It is enacted, that if any person that is entitled to any such action of trespass, detinue, action sur trover, replevin, actions of accounts, actions of debts, actions of trespass for assault, menace, battery, wounding, or imprisonment, actions upon the case for words, be, at the time of any such cause of action accrued, within the age of twenty-one years, feme covert, non compos mentis, imprisoned, or beyond the seas, that then such person shall be at liberty to bring the same actions, so as they take the same within such times as are before limited after their coming to or being of full age, discovert, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment, should be done.

In an action of trover (*a*), a question was, the defendant being beyond seas at the time the statute was made, and until primo Caroli, whether he were to be relieved by the equity of the statute, although not within the express words of this proviso? for that provides only where the

(*a*) Cro. Car. 333.

plaintiff is over the sea, to have his action when he returns, if he brings his action within the year after his return; but there is no mention, when the defendant is over the seas, of enlarging the time. And it was strongly urged for the plaintiff, that he was within the equity of the said proviso: for it would be *inutilis et stultus labor* to sue one to outlawry, being beyond seas, when it is erroneous and reversable at his return.

Jones and Berkley, Js. were of that opinion, that the defendant being beyond sea, was within the equity and intention of the statute, as well as where the plaintiff is beyond seas.

Richardson, Ch. J. doubted thereof, and said he would not deliver any opinion.

But Croke, J. conceived, that the defendant being beyond seas, is not within the equity of the statute: for the statute provided remedy where the plaintiff is over seas, and omitting where the defendant, &c. did it purposely, and never intended to provide any remedy for him, because the plaintiff may prosecute his suit by original, although the defendant be beyond seas, to an outlawry, which will shew there was not any remissness in him; which is the matter which the law intends, and that there should be a fresh prosecution; and when the defendant reverseth the outlawry, the plaintiff shall then know where he is to prosecute the suit against him; so the first original is not merely a fruitless and idle labour, but thereby preserves his action.

The same objection was raised in *Beven* v. *Clapham*(*a*); but the Court, in that case, held that it was within the reason and intent of the statute; but a different construction afterwards obtained.

The plaintiff brought an indebitatus assumpsit (*b*): the defendant pleaded, non assumpsit infra sex annos; and the plaintiff replied, that the defendant was all that time beyond sea, so that he could not prosecute any writ against him, &c. And, upon a demurrer, it was argued, that the plaintiff was not barred by the statute which was made to prevent suits, by limiting personal actions to be brought within a certain time; and it cannot be extended in favour of a defendant, who was a debtor and beyond sea, because it is uncertain whether he will return or not; and therefore there is no occasion to begin a suit till his return. It is true, the plaintiff may file an original, and outlaw the defendant, and so seize his estate, but no man is compelled by law to do an act which is fruitless when it is done, and such this would be; for if the plaintiff should file an original, it is probable the defendant may never return; and then, if the debt were a thousand pounds, or upwards, he would be at a great expence to no purpose, or if the party should return, he may reverse it by error. It is a new way invented for payment of debts; for if the debtors go beyond sea, and stay there six years, their debts would by this means be all paid. The words of the statute do not extend to this case; for the proviso is, "If the plaintiff be beyond sea when the cause of action doth accrue, that then he shall have liberty to continue it at his return;" yet it is within the equity of law for him to bring his action when the

(*a*) 1 Lev. 143. (*b*) 3 Mod. 311.

defendant returns, who cannot be sued till then. That statutes have been expounded according to equity is not now a new position; for constructions have been made according to the sense and meaning, and not according to the letter of many statutes; as the Statute of Westminster the 2d, c. 11. which gives an action of debt against a goaler for an escape, and that *per breve; yet*, by the equity thereof, it has been adjudged, that a bill of debt will lie. For the statute of 1 Ric. 2. c. 12. gives the like action against the warden of the Fleet for the escape of a prisoner in execution; which, by construction, has been adjudged to extend to all goalers and sheriffs. If this statute should not be expounded according to equity, then, if the plaintiff himself should be beyond sea six years after the cause of action, and die there, his executor or administrator cannot sue for a debt.

*Sed Curia.*—This case is out of the equity of the statute, which provides a remedy when the plaintiff is beyond sea, but not when the defendant is there. It was never intended to make any provision for him, since the plaintiff might file an original, and sue him to the outlawry. In S. C. Carth. 137. S. C. 1 Show. 99. it is said that judgment was given for the defendant.

But now, by the statute of 4 Anne, c. 16. s. 19, that "if any person or persons against whom there shall be any such cause of suit or action for seamen's wages, or any of the causes of action mentioned in the 21 Jac. 1. shall be, at the time of any such cause of suit or action accrued, beyond the seas, then the person or persons entitled to any such suit or action shall be at liberty to

bring the said actions, against such person and persons, after their return from beyond the seas, within such times as are respectively limited for the bringing of the said actions by this act, and by the said other act of 21 Jac. 1. c. 16."

It is reported, in an anonymous case in Shower, 1 vol. 91. that Dublin, or any other place in Ireland, is beyond the sea within this statute; but, since the union with Scotland, the plaintiff being resident there does not bring his case within this proviso.

In an action of assumpsit (*a*), the plaintiff replied to the plea of the Statute of Limitations, that he was resident in foreign parts, out of the kingdom of England, viz. at Glasgow, in Scotland, and therefore could not bring his action sooner. Demurrer, and joinder in demurrer.

For the defendant it was observed, that the exception in the Statute of Limitations 21 Jac. 1. c. 16. in favour of absent plaintiffs, says expressly, that they must be persons beyond the seas: that till the union of the crowns under Jac. 1. the constant language of the legislature was, "persons out of the realm." It was altered on that occasion, when the whole island came under the government of one prince; and the reason holds stronger now, when not only the crowns, but also the kingdoms, are united.

Wedderburn, for the plaintiff. The question is, whether persons out of the jurisdiction of the Courts of this country, though not literally beyond the seas, or out of

(*a*) Bl. 268.

the king's subjection, are not entitled to the same benefit? The Statute of Non-claim does not affect persons in Scotland. In Sir Robert Brooke's reading on statute 32 Hen. 8. c. 2. wherever the statute says, out of the realm, he uses in his comment the expression, "beyond the seas." This, and many other instances, shew, that these expressions have usually (though inaccurately) been used as synonymous terms. It has been questioned whether Scots bills of exchange are inland or foreign bills, and been determined by Ryder, Ch. J. at Guildhall, that they were foreign bills.

Dennison, J. (absente Lord Mansfield). This is a new experiment, and in the case of a positive law. The statutes 21 Jac. 1. c. 16. and 4 & 5 Anne, are both express, that the party to be excused must be beyond the seas. Here the plaintiff pleaded that he was in foreign parts, viz. in Scotland. What does he mean by foreign parts? He must be beyond the seas: that is the old and true expression. Before the union, England was an island of itself; since the union, Scotland is made part of it.

Foster, J. (absente Wilmot, J.) This is a very clear case. The Statute of Limitations ought to be construed literally. I think it a noble beneficial act. *Interest reipublicæ, ut sit finis litium.* There is no such kingdom as England now: plaintiff, therefore, while in Scotland, was not out of this realm. Besides, that is not now the phrase. Legislature, by altering it to "beyond the seas," at such a critical juncture, seem to have pointed at this very case of dwelling in Scotland. It is a great question, and very doubtful, whether the Statute of Non-claim does not now extend to residents in Scotland.

As at present advised, I should rather think it does. It is true, that since the union a writ of ne exeas regno has been issued from the Court of Chancery to prevent a man's going to Scotland (Done's case, 1 P. W. 263.): but the condition of the recognizance was a special case, not to go out of this realm, or to Scotland. Had these words been omitted, going to Scotland would not have forfeited the recognizance.

Judgment for the defendant.

In the saving clause, no actions on the case are mentioned, but actions on the case for words: therefore,

In assumpsit (*a*), by *Chandler*, an infant, by his guardian, against *Vilett*, the plaintiff declared upon two promises, that the defendant was indebted to him in £50. and £12. for monies by the said defendant before that time had and received to the use of the plaintiff; and being so indebted, the defendant promised to pay those monies, and had not paid them, wherefore he brought his action. The defendant pleaded in bar, non assumpsit infra sex annos; to which the plaintiff replied, that at the time of the promises, and also at the time of exhibiting the bill, he was and still is an infant within the age of twenty-one years; to which the defendant demurred in law. And it was objected, that this action was limited by the Statute of Limitations of 21 Jac. I. c. 16. and the privilege of infancy is not saved by the statute in this action; for in the restraining and limiting part of the statute, this action upon the case is limited to six years,

(*a*) 2 Saund. 117 g.

and it is not excepted in the saving clause of the act; wherefore, no actions on the case are saved and excepted by reason of infancy out of the body of the act, except only actions on the case for words. And all other actions on the case are limited within the body of the act, and are not saved and excepted in the case of infancy by the saving clause; and therefore the plaintiff should be barred.

*Sed non allocatur*; for by the Court, This action on the case is within the equity of the saving clause of the act, though it be not expressed; for the intention of the statute was not to preserve a trivial action on the case for slanderous words in respect of infancy, and not to save for the infant an action for a real duty, as in this case. Wherefore, it was adjudged for the plaintiff.

*Note.*—It was said, that the infant should have waited until his full age, because the six years were elapsed during his infancy, and therefore he could only pursue his action according to the words of the saving clause of the act, which is in six years after his full age; but this was not regarded by the Court. And it seemed to Saunders, that he may well pursue his action at any time within age, although the six years are elapsed. See for this, the case of non-claims in fines, 2 Inst. 519. Cotton's case.

In an action on the case (*a*), the plaintiff declared, that the defendant's testator being in his life-time, viz. such a day, indebted to the plaintiff in the sum of £20. for so

(*a*) 2 Mod. 71.

much money before that time to his use had and received, did assume and promise to pay the same when he should be thereunto required; and that the testator did not in his life-time, nor the defendant since his death, pay the money, though he was thereunto required. The defendant pleaded, that the testator did not, at any time within six years, make such promise. The plaintiff replied, that he was an infant at the time of the promise made, and that he came not to full age till the year 1672; and that, within six years after he attained the age of twenty-one years, he brought this action; and so takes advantage of the proviso in the Statute of Limitations, 21 Jac. 1. c. 16. that the plaintiff shall have six years after the disability by infancy, coverture, &c. is removed. The defendant demurred.

By Rigby, Serjeant. The reason of his demurrer was, because, in the said proviso, actions on the case on assumpsit are omitted. This act was made for quieting of estates and avoiding of suits, as appears by the preamble, and therefore shall be taken strictly. There is an enumeration of several actions in the proviso, and this is *casus omissus*, and so no benefit can be taken of the proviso. In a writ of error upon a judgment, brought 4 Car. 1. in the Court of Windsor, the Judges held, that an action on the case for slandering a man's title is out of this act, because such an act was rare, and not brought without special damages. But Hyde, Ch. J. doubted. 1 Cro. 141. The law-makers could not omit this case unadvisedly, because it is within those sorts of actions enumerated by this act. This promise was made to the plaintiff when he was but a day old, and it would

be very hard now, after so many years, to charge the executor.

But Turner, Serjeant, argued, that though an indebitatus assumpsit is not within the express words of the proviso, yet it is within the intent and meaning thereof; and so the rule is taken in Beufage's case, *quando verba statuti sunt specialia, ratio autem generalis, statutum intelligendum est generaliter.* And this is a statute which gives a general remedy; and the mischief to the infant is as great in such actions of indebitatus assumpsit as other actions; and therefore, it is but reasonable to intend that the parliament, which hath saved their rights in debts, trovers, &c. intended likewise that they should not be barred in an indebitatus assumpsit. In the case of *Smith* v. *Colshill* debt was brought upon a bond: the defendant there pleaded the Statute of the 5 Edw. 6. c. 16. of the selling of Offices, the words of which are, "that every bond to be given for money or profit, for any office, or deputation of any office, mentioned in the statute, shall be void against the maker." In that case, the bond was given to procure a grant of the office, and not to exercise the same. Now, though this was not within the express words of the statute, yet the bond was held void: and if it should be otherwise, the mischiefs which the statute intended to remedy would still continue; and therefore, the intent of the law-makers in such cases is to be regarded: for which reason, if actions of indebitatus assumpsit are within the same mischief with other actions therein mentioned, such also ought to be construed to be within the same remedy. But he took the case of *Swaine* v. *Stephens* to rule this case at bar; in which case this

very statute was pleaded to an action of trover; and the plaintiff replied, that he was beyond sea: and upon a demurrer to the replication, the Court held trover to be within the statute, it being named in the paragraph of limitation of personal actions, which directs it to be brought within the time therein limited; (that is to say) all actions on the case within six years; and then enumerates several other actions, amongst which trover is omitted: yet, the Court were there of opinion that trover was implied in those general words.

And of that opinion was the Chief Justice, and Wyndham and Atkyns, Js. that, upon the whole frame of the act, it was strong against the defendant: for it would be very strange that the plaintiff in this case might bring an action of debt, and not an indebitatus assumpsit. When the scope of an act appears to be in a general sense, the law looks to the meaning, and is to be extended to particular cases within the same reason; and therefore they were of opinion, that actions of trespass, mentioned in the statute, are comprehensive of this action, because it is a trespass upon the case; and the words of the proviso save the infant's right in actions of trespass. And therefore, though there are no particular words in the enacting clause which relate to this action, yet this proviso restrains the severity of that clause, and restores the Common Law, and so is to be taken favourably; and this action being within the same reason with other actions therein mentioned, ought also to be within the same remedy.

But Ellis, J. doubted whether actions of trespass could comprehend actions on the case; and that, when the

parliament had enumerated actions of trespass, trover, case for words, &c. if they had intended this action, they would have named it. He said, he was for restoring the Common Law as much as he could, but doubted much whether this proviso did help the plaintiff.

But judgment was given for the plaintiff.

Case (*a*) against an executor for £50. received by the testatrix. The defendant pleaded the Statute of Limitations in bar: and the plaintiff replied, she was under age at the time of the promise made; and that, within six years after she came of age, she filed an original against the defendant. The defendant rejoined, that the Statute of Limitations doth not give liberty to one who was an infant to bring an action on the case within six years after he is of age, &c. And upon demurrer rejoinder, the plaintiff had judgment; and the judgment in this case was given for the reasons in *Chandler* v. *Vilett*.

This question was again raised in *Rochtschilt* v. *Leibman* (*b*), where the plaintiff brought an action upon a bill of exchange, to which the defendant pleaded the Statute of Limitations, and the plaintiff replied himself beyond seas; to which the defendant demurred.

And Reeve objected, that no actions on the case are within the proviso, but actions on the case for words; and cited Cro. Car. 245. Show. 98.

Parker *contra*. Where the words of a statute are general, they are to be understood in that sense. 10 Co. 101.

(*a*) Kels. 74. (*b*) Str. 836.

It is impossible to think so trifling an action as for words should be saved, and not those which are founded on a contract: besides, it has been determined that the proviso extends to this case.

*Et per Curiam*—Judgment for the plaintiff.

## CHAP. IX.

### *What restores the Remedy.*

The statute does not extinguish the debt, but only bars the remedy: it may therefore be revived by a subsequent promise on the part of the defendant; though it was formerly holden, that a promise renewed within six years, if not upon a new consideration, would not bind (*a*). But it has since been ruled, that a promise of payment within the six years, though the debt were contracted long before, would deprive the defendant of the benefit of the statute. And at the present day, a promise to pay a preceding debt, barred by the statute, is sufficient to revive that debt, and no new consideration is necessary (*b*).

So, also, is a conditional promise, upon the condition being performed; as, where the plaintiff, as executor (*c*), brought an action of assumpsit for goods sold by the testator to the defendant, the defendant pleaded the Statute of Limitations; and in evidence it appeared, that the goods were sold six years before the action was brought; but that the defendant said to the plaintiff, when he demanded the money, "Prove it, and I will pay you:" for that was a new promise, and should charge the defendant notwithstanding the Statute of Limitations; for it

(*a*) 2 Vent. 152. (*b*) 2 Show. 126. (*c*) 5 Mod. 426.

was as much as to say, if the goods were sold to the defendant, he promised to pay for them.

In the case of a promise by the defendant (*a*) to pay a preceding debt when he should be able, it is incumbent on the plaintiff to shew that the defendant was of ability to pay at the time of action brought.

But a promise to pay an executor cannot be given in evidence upon the issue of assumpsit infra sex annos to the executor's testator.

Assumpsit (*b*) was brought by an executor upon a promise to his testator, to which the defendant pleaded the Statute of Limitations; and, upon evidence, it appeared, that after the death of the testator, and after six years elapsed from the time of the contract, the defendant owned the debt to the executor, and promised to pay it. But it was held that the action could not be maintained, the promise being made to the executor, and so out of the issue. But it would have been otherwise, had the promise been made to the testator within six years.

And in a recent case, in the Court of King's Bench (*c*), wherein assumpsit was brought upon the money counts, in all of which the promises were laid to be made to the intestate; to which the general issue and the Statute of Limitations were pleaded. And at the trial, before Lord Ellenborough, Ch. J. at the sittings after Michaelmas Term, in the 43d Geo. 3. at Guildhall, the only evidence given was, of an acknowledgment by the defendant since the death of the intestate, and within six years, of an old

(*a*) 3 Esp. 159. (*b*) Ld. Raym. 1101. (*c*) 3 East. 409.

existing debt, due to the intestate more than six years before; a verdict was taken for the plaintiff, with leave to the defendant to move to set it aside, and enter a nonsuit; which was accordingly moved for by Gibbs, who observed, that though an implied promise to pay might be raised from the acknowledgment of the debt, yet it must be raised to a person living at the time when the acknowledgment was made, and could not refer back, by relation, to a period before the intestate's death; and if not, then the evidence could not apply to any of the counts of the declaration.

Lord Ellenborough, Ch. J. when cause was to have been shewn, said, that the case of *Green* v. *Crane*, 2 Ld. Raym. 1101. was decisive in support of the objection, and that a nonsuit must be entered.

Park, for the plaintiff, admitted that that case was in point against him, if the Court thought that it had been properly ruled.

The rule was made absolute to enter a nonsuit.

Acknowledgment of a debt within six years, though not a promise, yet it is evidence of a promise (*a*); and it is settled, that the slightest acknowledgment will be sufficient to create such a promise (*b*), as, "I am ready to account, but nothing is due to you." And (*c*), though the acknowledgment be made after the action brought, it has been held sufficient.

(*a*) 5 Mod. 426. (*b*) Cowp. 548. (*c*) Burr. 1099.

It was ruled at Nisi Prius, in the case of *Clarke* v. *Bradshaw and Coghlan* (a), that an acknowledgment by the defendant to the clerk of the plaintiff's attorney, on the subject of the arrest, that the plaintiff had paid money for him twelve or thirteen years before, but that he had since become a bankrupt, by which he was discharged, as well as by law, from the length of time since the debt had accrued. It was contended, that this evidence was not sufficient to charge the defendant; that it was against the sense and spirit of the statute that it should be so; that the plea of the Statute of Limitations itself admitted the existence of the debt, but claimed a discharge by reason of the statute; and that it would be depriving the party of the protection of the statute, if the claim of that protection should be construed into an admission of the debt, and be sufficient to charge him.

Lord Kenyon said, he was not now to put a construction on the Statute of Limitations for the first time. It had been decided, that an acknowledgment of the debt was sufficient to take the case out of the statute; and he was bound to hold it so.

And this has been confirmed by a subsequent decision of the Court of King's Bench, that an acknowledgment of the debt, though it be accompanied with a declaration by the defendant that he did not consider himself as owing the plaintiff a farthing, it being more than six years since he contracted the debt, is sufficient to take the case out of the Statute of Limitations.

(a) 3 Esp. 157.

In an action of assumpsit (*a*) for wheat sold and delivered, the defendant pleaded the general issue, and the Statute of Limitations. And at the trial, the plaintiff proved that the defendant, on being arrested, said, "I do not consider myself as owing the plaintiff a farthing, it being more than six years since I contracted. I have had the wheat I acknowledge, and I have paid some part of it, and £26. remains due." On the part of the defendant it was objected, that these expressions amounted to no more than what he had stated upon record in his plea, which confessed the existence of the debt, but avoided the action, by alledging the lapse of time.

The learned Judge, however, thought that, according to the authorities, such an acknowledgment of the existence of the debt must be deemed sufficient to take the case out of the statute; though, if the matter had been *res integra*, the point might have admitted of doubt. And accordingly, by his direction, a verdict passed for the plaintiff.

It was moved to set aside the verdict, and have a new trial, on the ground that the implied promise of payment from a subsequent acknowledgment, may be rebutted; as, where the acknowledgment is accompanied with a positive declaration that the party did not consider himself bound in law to pay the debt; otherwise, the very plea of *non assumpsit infra sex annos*, which is an acknowledgment of an antecedent debt, might be strained into a promise. But if an acknowledgment and an avoidance, when put in the form of a plea upon the record, be a good defence, it cannot overset the plea when tendered

(*a*) 4 East. 599.

in evidence. The rule to shew cause was granted, after some hesitation. But when cause was to have been shewn, the Court said, that whatever their opinion upon the statute might have been had the question been new, yet, after the long train of decisions upon the subject, it was necessary to abide by the construction which had been put upon it; in conformity with which, they thought themselves bound to hold, that what was said by the defendant was a sufficient acknowledgment of the pre-existing debt to create an assumpsit, so as to take the case out of the Statute of Limitations.

An offer, authorized by the defendant, of two shillings and sixpence in the pound, is a sufficient acknowledgment to take the case out of the statute (*a*).

But an acknowledgment by the defendant that he was guilty of a breach of contract, does not shew that the plaintiff has any cause of action that has accrued within six years (*b*).

In an action for not accepting and paying for a set of prints from the plays of Shakespeare, according to the undertaking into which it was alledged the defendant had entered by subscribing to the work, to which the defendant pleaded the Statute of Limitations; it appeared, that in December 1786, the plaintiff proposed publishing by subscription a series of large prints from some of the scenes in Shakespeare's plays; that seventy-two scenes were to be published, at the rate of two to each play; and the whole were to be published in numbers, each containing four large prints, at the price of two guineas a number: that

(*a*) 2 Camp. 11. (*b*) 2 Camp. 157.

two guineas were to be paid at the time of subscribing, and on the delivery of each number, the remaining guinea for that was to be paid, together with two guineas in advance towards the succeeding number: that one number, at least, should be published annually. On the 7th of April 1790, the defendant became a subscriber. The first number was published in June 1791; the second in March 1792; both of which were delivered to the defendant. The work was completed in 1803. Copies of the different numbers were regularly laid by for the defendant, but they were not called for; and he was never required individually to carry them away and pay for them till the year 1807.

It was contended by the plaintiff's counsel, that supposing the statute to have run as to each particular number from the time when that was published, the case had been taken out of the statute by the defendant's acknowledgment. A letter from the defendant was accordingly given in evidence, which was dated the 1st April 1807, and in which he said, "I ceased taking in the numbers of the Boydell Shakespeare many years ago, in consequence of the engagement not having been fulfilled on the part of the proprietors; and not having been applied to from that time till very lately, I do not consider myself "called upon to complete the set." It was likewise proved, that the defendant had lately observed, that "he had refused to take them in, because they did not answer his expectations."

Lord Ellenborough, without giving any decided opinion upon the general question, said, that the defendant's liability could not be affected by the letter or declaration,

He has only acknowledged, that he was guilty of a default ten or twelve years ago. How does this shew that the plaintiff has any cause of action which has accrued within six years? If a man acknowledges the existence of a debt barred by the statute, the law has been supposed to raise a new promise to pay it, and thus the remedy is revived; but no such effect can be given to an acknowledgment where the cause of action arises from the doing, or omitting to do, some act at a particular moment, in breach of a contract. This is like the case of criminal conversation, where the defendant being accused, shortly before the commencement of the suit, of having seduced the plaintiff's wife, said, he had not been guilty within six years. That allowed that there was once a cause of action, but the statute was held to be a bar.

In the case of *Rucker* v. *Hannay* (*a*), the defendant had stated to the Court, in an affidavit for leave to plead the Statute of Limitations, that, "since the bill of exchange (on which the action was brought) became due, (which was more than six years before) no demand for payment had been made on him;" and this was deemed sufficient to be left to the jury as an acknowledgment; and the jury having found a verdict for the plaintiff, the Court refused to grant a new trial.

A letter written by a defendant (*b*) (who pleaded the Statute of Limitations) to the plaintiff's attorney, on being served with a writ, couched in ambiguous terms, neither expressly admitting nor denying the debt, should be left to the jury to consider whether it amount to an acknowledgment of the debt, so as to take it out of the Statute of Limitations.

(*a*) 4 East. 604. (*b*) 2 T. R. 760.

Assumpsit for work and labour by the plaintiff, an attorney. Pleas, the general issue, and the Statute of Limitations. At the trial, at Hereford assizes, in 1788, before Lord Kenyon, the plaintiff produced the following letter, written to his attorney by the defendant, in January in that year, in order to take this case out of the Statute of Limitations:—"I have lately been served, by Mr. Meredith Price, with a writ at the suit of one Lloyd. I am at a loss to know whether was it your orders, or was it some other of the same name. For several reasons, I cannot suppose that an old particular friend would ever be guilty of causing an action to be commenced, without first advising him on it. I believe that you have had no cause to contradict my saying, that I always served you on all occasions that ever lay in my power; therefore, I flatter myself that you have no concern in this business. However, if it should appear to the contrary, I must beg leave to inform you, that before I will pay any cost more than defending, will absolutely take house in the liberty of Carmarthen, which, I am fully satisfied, will answer my expectations in business much better than here at Landovery. As to Mr. P.'s views, I am no stranger at all to, and see through them without a spectacle; and as to your part, cannot expect to reap any benefit from that quarter, as he says you are indebted to him to the amount of £700. Therefore, if you seriously consider your own interest, you cannot be any gainer by endeavouring to injure a man who has always been your friend. However, you are to act as you think proper. As in respect to matters between you and me, will be rectified when I can settle my affairs, which I believe will now soon be. Mr. Rice Davies, of Swansea, has received positive orders from Mr. R. Price and son, to sell the Erwastod and Cwmbdu estates, and will

be advertised soon. I cannot believe that they will be sufficient to discharge the mortgage, and Mr. Davies's demand, which amounts, in cash lent and business done, to £1000."

The learned Judge, being of opinion that this did not amount to a promise, or acknowledgment of the debt, so as to take it out of the Statute of Limitations, nonsuited the plaintiff.

A rule was obtained, and cause shewn, why the nonsuit should not be set aside, and a new trial granted. Lord Kenyon, Ch. J. having tried the cause, declined giving any opinion upon the subject.

Ashurst, J. said, the only doubt in his mind was, whether the letter should not have been left to the jury for them to form their opinion upon it. For it was certainly true, that any acknowledgment would take the case out of the Statute of Limitations. Though this letter was written in ambiguous terms, there are some parts of it from which the jury might perhaps have inferred an acknowledgment of the debt. Throughout the whole of it the defendant does not deny the existence of the debt. He begins with reproaching the plaintiff for not giving him some information of his intention to bring an action against him; and then he says, in substance, "that sooner than pay the costs he will go to goal." And in another part he adds, "As to the affair between you and me, it will be rectified soon." That, perhaps, did contain an insinuation that something was due; and he thought the jury should have put their construction on it.

Buller, J. said, that it had been held that the slightest acknowledgment would take the case out of the Statute of Limitations; as, where the defendant said, "I am ready to account, but nothing is due to you." The defendant, in his letter, affects not even to know at whose suit the action was commenced; but it was evident that that was merely a pretence. The whole of it was a begging letter, and it was evidently intended to gain time; and he was of opinion that it should have been left to the jury.

Grose, J. observed, that the letter seemed to him to be rather more than a begging letter: for it was intended to deter the plaintiff from going on with his suit, by threatening him, that though he should succeed in the action he should gain nothing by it. Now, if nothing were really due at that time, the attempt to hinder the plaintiff from proceeding in the action would be absurd: therefore, he thought that letter was exceedingly strong from which to infer an acknowledgment of the debt.

In an action for goods sold and delivered (*a*), to which the defendant pleaded the general issue, and the Statute of Limitations. At the trial, before Lord Alvanley, Ch. J. at the sittings after Hilary Term, 1804, it appeared that the debt had been contracted above six years before the commencement of the action; that the defendant having been applied to for payment of the debt by a letter from the plaintiff, dated the 23d of July 1803, wrote to the plaintiff on the 26th of the same month, in the following terms: "I have received your letter of the 23d, and must refer you to Messrs. C. my solicitors, whose opinion

(*a*) 1 New Rep. 29.

always governs me. I recommend you to call on them, as it will save you the trouble of a journey to W. They are in possession of my determination and ability." In consequence of this letter, a person on behalf of the plaintiff having called on Messrs. C. and stated that he came on account of the defendant's bill, was informed by them that the defendant was out of town, but that, if the plaintiff had any letter which would bind the defendant, the debt would be paid, if it amounted to £100.

Lord Alvanley considered himself bound, by the case of *Lloyd* v. *Maund*, 2 T. R. 760. to leave it to the jury to decide whether the above letter, coupled with the subsequent conversation at Messrs. C.'s, amounted to an acknowledgment of a debt.

The jury found a verdict for the plaintiff.

A rule nisi for a new trial having been obtained on a former day—

Sir James Mansfield, Ch. J. said, the letter written by the defendant in the case of *Lloyd* v. *Maund* was very different from that written by the defendant in this case. The turn of the letter in that case was, that it was unjust that the plaintiff should do any thing to injure the defendant; and that, rather than pay any costs beyond those of defending the action, the defendant would go to goal. But how could the plaintiff send the defendant to goal, unless some debt was due? In the present case, although the term "ability" might seem to import that the defendant owed something that he could not pay, yet he did not think there was sufficient in that expression unexplained

to take the case out of the statute. When the case is tried again, the plaintiff might examine Messrs. C. as to the defendant's ability, and as to any determination he had communicated to them respecting payment of the demand.

Heath and Rooke, Js. concurring, the rule was made absolute.

So, in assumpsit brought to recover the amount of a bill of exchange drawn on the defendant and Lord Cork, in favour of the plaintiff. The defendant pleaded the Statute of Limitations. The bill, at the time of the action brought, was of near nineteen years standing; which was relied upon by the defendant's counsel as affording the strongest presumption that the debt had been satisfied; the defendant having been at all times in a situation to be sued for it. To support a new promise within the six years, the plaintiffs relied that the defendant, having become much involved, had assigned his estates to trustees for payment of his debts; and in answer to an application for payment of this money in the year 1792, had written the following letter to plaintiffs:

"I received your letter, and beg leave to refer you to my trustee, Mr. H. Wall, of Paper Buildings, on this complicated business. I should be glad to be informed how you have settled it with Lord Cork.

"I am, &c. Inchiquin."

But they gave no evidence of this trust, but they relied merely on this letter.

Lord Kenyon ruled, that where a debt was established, (as here it was, by proving the hand-writing of the defendant to the bill) who relied on the Statute of Limitations, if the plaintiff gave any general evidence of acknowledgment, that it should be taken to apply to the debt in question; and that it should lie on the defendant to explain the promise so made, and shew that it applied to some other demand. In the present case the demand was established; and the bill being drawn on Lord Cork, and his name being mentioned in the letter, fortified the construction, that this letter applied to the demand on the bill in question. And as to the letter, his Lordship thought it was an acknowledgment.

We have seen above, that a promise made by a debtor will revive a preceding debt; and that an acknowledgment of a debt is evidence of a promise to pay; and we have considered the evidence proper to be admitted to prove such acknowledgment. We now come to consider what effect the acknowledgment of one of several parties to the same contract will have in restoring a debt, it being barred by the statute.

In *Bland* v. *Haselrig* (*a*), an assumpsit was brought against four, who pleaded the Statute of Limitations; and the verdict was, that one of the defendants did assume within six years, and the other non assumpsit. And it was held by the Court, (*dissent'* Ventris, J.) that the plaintiff could not have judgment against the defendant, who was found to have promised within six years.

(*a*) 2 Vent. 151.

This case may be explained on the manner of the finding; for as the plea was joint, and the replication must have alledged a joint undertaking, the verdict did not find what the plaintiff had bound himself to prove. But at the present day, upon the principle of subsequent decisions, the jury ought to have considered the promise of one as the promise of all; and therefore should have found a general verdict against all.

The acknowledgment of one out of several drawers of a joint and several promissory note, takes it out of the Statute of Limitations as against the others, and may be given in evidence on a separate action against any of them.

In an action on a promissory note (*a*), tried before Hotham, Baron, at the Spring assizes, in Hampshire, in the year 1804, (to which the defendant pleaded the statute) the plaintiff produced a joint and several note, signed by the defendant, and three others, and having proved payment, by one of the others, of interest of the note, and part of the principal, within six years, and the Judge thinking that was sufficient to take the case out of the statute, as against the defendant, a verdict was found for the plaintiff.

A rule was afterwards granted to shew cause why there should not be a new trial, on the motion of Lawrence, who cited *Bland* v. *Haselrig*. And in support of the application he contended, that the plaintiff, by suing the defendant separately, had treated this note exactly as if it had been signed only by the defendant; and therefore, whatever

(*a*) Doug. 652.

might have been the case in a joint action, in this case the acts of the other parties were clearly not evidence against him. The acknowledgment of a party himself does not amount to a new promise, but is only evidence of a promise. This was determined in the case of *Heylin* v. *Hastings* (*a*), and in *Humings* v. *Robinson* (*b*). He said, that it was decided, that the confession of nobody, but a defendant himself, is evidence against him. That last case was an action by an indorsee of a note against the drawer; and the plaintiff proved the acknowledgment of a mesne indorser, that the indorsement on the back of the note was in his hand-writing; but the Court was of opinion, that this was not evidence against the drawer, but that the indorsement must be proved. It would certainly open a door to fraud and collusion, if this sort of evidence were, in any case, to be admitted. A plaintiff might get a joint drawer to make an acknowledgment, or to pay part, in order to recover the whole, although it had been already paid.

Lord Mansfield said, the question here is, only whether the action is barred by the Statute of Limitations. When cases of fraud appear, they will be determined on their own circumstances. Payment by one is payment for all, the one acting virtually as agent for the rest; and in the same manner, an admission by one is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due.

Willes, J. said, The defendant has had the advantage of the partial payment, and therefore must be bound by it.

(*a*) 12 Mod. 223. 1 Salk. 29. (*b*) Barnes, quarto edit. 434.

Ashurt and Buller, Js. of the same opinion.

The Rule was discharged.

And where one of two makers of a joint and several promissory note having become a bankrupt, the payee received a dividend under the commission on account of the note, that will prevent the other maker from availing himself of the Statute of Limitations, in an action brought against him for the remainder of the money due on the note, if the dividend had been received within six years before the action brought.

James Fairbank, and William Fairbank, his son (*a*), made their joint and several promissory note, on the 18th July 1784, to the defendant, for £100. In the same year James Fairbank became a bankrupt, and the plaintiff received several dividends under the commission, in respect of the £100. secured by the note in question; the last of which was paid in the course of the year 1793; and there remained due £58. 6*s*. 8*d*. for which an action was brought. The defendant pleaded the Statute of Limitations, but a verdict was found for the plaintiff, under the direction of Mr. Justice Heath.

A rule being granted to shew cause why there should not be a new trial, the question was, whether the payment of part of the money due on the note by the assignees took the case out of the Statute of Limitations?

It was contended for the plaintiff, that the act of the assignees was the act of the bankrupt himself: and if the

(*a*) 2 H. Bl. 340.

bankrupt had acknowledged or paid part of the debt, the presumption raised by the length of time would have been repelled. That it had been decided in *Whitcomb* v. *Whiting* (*a*), that the acknowledgment of one of several drawers of a joint and several promissory note takes it out of the Statute of Limitations as against the others, and might be given in evidence in a separate action against any of the others.

It was insisted, on the other hand, that, as the bankrupt himself had done no act to acknowledge the debt, the case came within the Statute of Limitations, of which the assignees of one of the drawers could not prevent the other from availing himself.

But the Court were clearly of opinion, that the payment of the dividend under the commission was such an acknowledgment of the debt as took the case out of the Statute of Limitations.

In a subsequent case at Nisi Prius, in Easter Term, 40 Geo. 3. (*b*) in the King's Bench, assumpsit was brought for money paid, laid out, and expended to the use of two defendants; to which was pleaded the Statute of Limitations by one of them. The defendants had formerly carried on business as merchants in Cork, in Ireland, and had become bankrupts. While they carried on trade, the plaintiff had given his guarantee to Messrs. Hammerslys, the bankers, to secure any advances made to the defendants in consequence of their intercourse with England. The bankers had made advances for their use to the amount of £1800; but the plaintiff had not been

(*a*) Doug. 651.

(*b*) 3 Esp. 155.

called upon on his guarantee until after the bankruptcy of the defendants, when he paid the money, and now brought his action against them for money paid to their use. One of the defendants let judgment go by default; and the plaintiff relied upon a letter written by him in the course of the preceding year, as containing promises to pay, and an acknowledgment sufficient to bind the other defendant.

It was contended that this promise was of no avail, as it was made at the time when the defendant was a bankrupt; and, at all events, it could not bind the other defendant.

On the other hand it was contended, that this was a debt contracted by the two defendants while in partnership, and on their joint account, and cited *Whiting* v. *Whitcomb*, and what was the case where the demand arose under an express contract, as in the case of notes equally applied, to the implied contract, where the money was paid on account of the two.

Lord Kenyon said, he had some doubts upon the point, and would reserve the case. But an acknowledgment by the defendant being proved, the plaintiff had a verdict.

# CHAP. X.

## *Of pleading the Statute.*

THIS Statute, and also the 32 H. 8. c. 2. of Limitations, are exceptions to the rule, "that where an action is required by statute to be brought within a certain time, it is the duty of the plaintiff to prove that he has done so, or he will fail in his suit."

The statute 31 Eliz. c. 5. s. 5. which limits actions upon penal statutes to two years after the commission of the offence, where the forfeiture is given to the king only, and to one year, where it is to the king and any other person, is conceived in terms almost similar to the present: and it seems, that the defendant may take advantage of that statute on the general issue, and need not plead it; the practice at Nisi Prius being, for the defendant to call upon the plaintiff to prove the commencement of his action within the limited period; and many questions arise as to what shall be said to be the proper commencement of it (*a*): but the defendant must plead this statute if he mean to take advantage of it; although the cause of action appear on the declaration to have accrued more than six years before: for it is settled, that the Statute of Limitations does not destroy the debt; it only takes away the remedy: and the debtor may either

(*a*) 2 Saund. 62 c (6).

take advantage of the statute, if the debt be older than the time limited for bringing the action, or he may wave the advantage (*a*).

In a case in the King's Bench, 15 Car. 2. the declaration was on a promise made the 1st May, 3 Car. 1. for money lent: and after verdict, it was moved in arrest of judgment, for that it appeared by the declaration, that the cause of action did arise above six years before the action brought. But by the Court judgment was given for the plaintiff: for, though the cause of action appeared to be twenty years before the action brought, yet the plaintiff shall recover, if the defendant does not plead the statute; which was made for the ease of those who would take advantage thereof; but the Court shall not give the defendant advantage thereof, if he will not plead it (*b*).

But this reason, though admitted to be true as a proposition, at law has been denied to be satisfactory: and the true ground of distinction between this statute and the statute 31 Eliz. and other statutes limiting penal actions to a definite period, is supposed to be, because the statute 21 Jac. 1. c. 16. limits those actions where a debt, or other cause of action, is already vested in the plaintiff by means of some contract, or other transaction, between the plaintiff and defendant, prior to the bringing of the action: but in penal actions, the duty or right of action attaches in the plaintiff merely by bringing the action, and did not exist in him before; and unless he brings his action within the time prescribed, there is no right of action attached in him; therefore, he seems as much bound to prove the commencement of his action

(*a*) Burr. 2630. (*b*) 1 Lev. 110.

within time, which is the cause or consideration of it, in order to entitle himself to a verdict, as a person who brings assumpsit or debt for goods sold and delivered, or money lent, and the like, is, to shew the cause or consideration of his action to intitle him to a verdict; and if he fail therein, it appears that he has no cause of action. But the Statute of Limitations admits the cause or consideration of the action still existing, and merely discharges the defendant from the remedy; so that a promise within six years, without any other consideration, is sufficient to revive the action; therefore, if he will take advantage of that circumstance, it is necessary he should plead the statute (*a*).

In the King's Bench, 23 & 24 Car. 2. the declaration was on a promise seven years before, to pay money within three months after: yet, because the defendant had not pleaded the statute, he could not have advantage of it (*b*).

So, in error of a judgment in the Common Pleas, in assumpsit: and the first error assigned was, that it appeared upon the declaration, that the cause of action accrued more than six years before, &c. and therefore it was not necessary to plead the statute. *Sed non allocatur*: for the statute in this case, as well as in all others, ought to be pleaded; for it might be, that the original was sued within six years after the cause of action; and therefore the defendant shall plead the statute, to the end that the plaintiff may have an opportunity to reply to such matter (*c*).

(*a*) 2 Saund. 63 a. note 2. (*b*) 1 Vent. 191. (*c*) 2 Ld. Raym 838.

But, at first, it was not considered necessary for the defendant to plead the statute; for in Trin. Term, 4 Car. 1. in assumpsit, after verdict given for the plaintiff, it was moved in arrest of judgment, that the promise was alledged to be made beyond the time limited in the Statute of Limitations, and the action was not brought within the time limited thereby.

All the Court held, that if it appear so by the plaintiff's own shewing, that the action is not brought within the time limited by the statute, the plaintiff cannot maintain his action, but judgment shall be given against him: or, if the contract in the assumpsit or debt be alledged to be within the time limited by the statute; and, upon non debet or non assumpsit pleaded, it appears upon the evidence, that the assumpsit or contract was beyond the time limited, the action lies not, and the defendant shall take advantage thereof, if it be specially found by the jury; for the statute is in the negative, "that he shall not maintain such an action but within the time limited by the statute."

But in the principal case it appeared, upon the view of the record, that the action was brought within the time limited; and therefore it was adjudged for the plaintiff. This was in the Common Pleas (*u*).

But the Court of King's Bench always inclined, and finally settled, that no advantage could be taken of the statute, unless it was pleaded.

(*u*) Cro. Car. 115.

And in an action of assumpsit by the executrix of an attorney of the Common Pleas for fees and expences, the defendant pleaded non assumpsit, which was found against him. And on a writ of error brought, an exception was taken, because the promise was upon the 18th day of July 1621, and the breach assigned for not paying upon request was in September 1621; and the action was brought in the Common Pleas in Michaelmas Term, 3 Car. 1. and so above six years after the promise and breach; and then, by the Statute of Limitations, he ought not to maintain that action. But because it was not pleaded, though the declaration was in Michaelmas, 3 Car. 1. the original writ not being certified, nor appearing when it was sued out, the Court did not much regard it; and thereupon the judgment was affirmed (*a*).

But in the following Term, in the King's Bench, on the same point, the Court was equally divided.

Assumpsit against an administrator, upon a promise by the intestate; supposing that the intestate borrowed of the plaintiff upon the 1st day of May, 12 Jac. 1. twenty pounds, and in consideration thereof promised to repay it him on request; and that the plaintiff, upon the 1st August, 12 Jac. 1. requested the payment, and he had not paid it; and that the intestate died, and administration was committed to defendant, who, upon request, had not paid it, although he had assets. Upon non assumpsit pleaded, the verdict was found for the plaintiff.

(*a*) Cro. Car. 159.

It was moved in arrest of judgment, that this assumpsit being made 12 Jac. 1. and the breach in the same year, this action is brought too long after; for, by the Statute of Limitations, it should be brought within six years.

Jones and Whitelock, Js. conceived the defendant ought not to take advantage of this statute, unless he had pleaded it, or had demurred thereupon, because the statute hath divers exceptions; so that if it be brought after the time, if the plaintiff were an infant, or feme covert, &c. it were well enough.

But Hyde, Ch. J. and Croke, J. conceived, forasmuch as it appeared, by the plaintiff's own shewing in his declaration, that it was out of the limitation of the statute, and the statute is in the negative, "that it shall not be brought at all," unless it be brought within the time limited by the statute; therefore, the defendant should have advantage thereof by exception, without pleading.

Whereupon the Court would further advise (*a*).

The same objection was taken five years after, in arrest of judgment; and the Court of King's Bench then ruled, that the Statute of Limitations must be pleaded, and cannot be taken advantage of on motion.

Action for words, and declares they were spoken 2 Car. 1. the defendant pleaded not guilty, and it was found against him. It was moved in arrest of judgment, that the action was brought for words spoken six years before the action commenced; so that by the Statute of

(*a*) Cro. Car. 163.

Limitations he was barred of this action; and therefore the Court ought not to give judgment upon this verdict for the plaintiff.

Jones and Berkeley, Js. held, that the plaintiff ought to have judgment, because the defendant had not pleaded the statute: for there might be divers causes that he could not bring the action before that time, viz. that he was in prison, or within age, or beyond seas, or that he had sued the defendant to outlawry, and the defendant had reversed the outlawry, and this action brought within a year after the reversing the outlawry (as in truth the case was); for then the action was well brought.

But it was moved, that he should have then shewn it in his declaration.

It was adjudged for the plaintiff (*a*).

So, in an action for words, the declaration stated the speaking to be on the 20th September, 7 Car. 1. whereupon the plaintiff brought his action in the King's Bench, in Michaelmas Term, 10 Car. 1. the defendant pleaded not guilty, and found against him.

And it was moved in arrest of judgment, that these words being spoken 20th September, 7 Car. 1. and the action being brought in Michaelmas Term, 10 Car. 1. (whereas it ought to be brought within two years by the Statute of Limitations) by his own shewing, it is brought for words spoken above two years, and therefore he is to be barred of this action.

(*a*) Cro. Car. 381.

But because he had admitted the action, and had not pleaded the Statute of Limitations, but not guilty—

Jones and Berkeley, Js. held, that he should not then have advantage thereof.

And Jones said, he knew it had been so ruled twice in the time of the Lord Lea, Ch. J. and in the time of Sir Randall Crew, Ch. J.; for otherwise, there would be a mischief in this Court more than in another Court, viz. in the Common Pleas, where they prosecute by original and outlawry; and the outlawry be reversed, the statute aids the plaintiff. But here they proceed by latitat, whereby the cause of action doth not appear, and may, peradventure, divers years continue by process, before the defendant be arrested, and the plaintiff, in his declaration, needs not shew the cause wherefore he did not commence his suit sooner: for if he should do so, the declaration would be more prolix than was convenient. But if the defendant pleads the Statute of Limitations, then the plaintiff, by the replication, ought to shew good cause why he did not bring his action within the time limited by the statute, otherwise he is to be barred: for the statute allows of many impediments, viz. infancy, imprisonment, ouster le mer, and others therein mentioned, which shall be sufficient causes that the action was not brought sooner.

But Croke, J. doubted thereof, because, by his own shewing, it appeared that the action was not brought within the time limited by the statute, and the statute is in the negative, "that it shall not be brought but within

the time;" so the Court, *ex officio*, ought to abate it, unless he had shewn wherefore it was not brought within the time.

But by the opinion of the other justices, it was adjudged for the plaintiff, unless other cause, &c. (*a*) which seems to have settled the question.

But a distinction has been taken with respect to pleading the statute in debt: for by Holt, Ch. J. in the case of *Draper* v. *Glassop* (*b*), if the defendant plead non assumpsit, he cannot give in evidence the Statute of Limitations, because the assumpsit goes to the præter tense; but upon nil debet pleaded, the statute is good evidence, because the issue is joined *per verba de præsenti*, and without doubt, nil debet by virtue of the statute; and it is no debt at this time, though it was a debt. The modern practice, however, is, to plead the statute in one action as well as the other.

The plea of non assumpsit infra sex annos is insufficient in many cases; for if the cause of action accrues within six years, it is immaterial when the promise was made.

In assumpsit, the declaration stated, that the defendant was a merchant, and transmitted several goods beyond sea; and promised the plaintiff, that if he would give him so much money, he would pay him so much out of the proceed of such parcel of goods as he was to receive from beyond sea. The defendant pleaded the Statute of Limitations, and did not say non assumpsit infra sex

(*a*) Cro. Car. 404. (*b*) 1 Ld. Raym. 153.

annos, but that "the cause of action did not arise within six years." The plaintiff demurred, because the cause was between merchants, &c. The whole Court held the statute to be well pleaded, and Jones, J. said, The defendant has pleaded well in saying, that "the cause of action did not arise within six years;" for the cause of action ariseth from the ship coming into port, and the six years are to be reckoned from that time (*a*).

In the case of *Puckle* v. *Moor* (*b*), the declaration was on a promise made seven years before to pay money three months after; and the defendant pleaded non assumpsit infra sex annos, whereas it ought to have been, non accrevit infra sex annos.

So, in an action upon the case, upon a promise to pay money three months after, to which the defendant pleaded non assumpsit infra sex annos; it was urged, that as this promise was laid, he ought to have pleaded that the cause of action did not accrue within six years.

Sympson said, Non assumpsit infra sex annos relates to the time of payment, as well as the promise.

But Hale, Ch. J. said, That cannot be.

Twisden, J. If I promise to do a thing upon request, and the promise were made seven years ago, and the request yesterday, I cannot plead the statute; but if the request were six years ago, it must be pleaded

(*a*) 1 Mod. 71. (*b*) 1 Vent. 191.

specially, viz. that causa actionis was above six years since (*a*).

Error upon a judgment of the Common Pleas in assumpsit, where the plaintiff declared, that the defendant, in consideration that the plaintiff would receive A, B, and C, into her house *ut hospites*, and provide for them meat, drink, &c. to pay so much money as she should deserve; and that the plaintiff avers, that she received them into her house, but did not say *ut hospites*, and provided meat, drink, &c. The defendant pleaded non assumpsit infra sex annos. Upon which the plaintiff demurred; and judgment in the Common Pleas for the plaintiff. And it was agreed by all that the plea was ill: for this being an executory collateral promise, the defendant cannot plead non assumpsit infra sex annos, but should have pleaded, causa actionis non accrevit infra sex annos; for if the cause of action accrued within the six years, it matters not when the promise was made; but if it had been indebitatus assumpsit, that plea had been good (*b*).

So, in an insimul computasset, the count upon which the question arose was, that upon an account taken the 9th of January, the defendant appearing to be indebted to the plaintiff in the sum of £150. promised payment upon the 30th of January. The defendant pleaded non assumpsit infra sex annos: to this it was demurred, because the six years are to be computed from the time of the performance, and not of the promise; and therefore this plea might be true, and yet the plaintiff not barred by the Statute of Limitations; and therefore the plea should have

(*a*) 1 Mod. 89. (*b*) Ld. Raym. 838.

been, actio non accrevit infra sex annos. And of that opinion was the Court (*a*).

In Hilary Term following there was another case parallel *omnibus*.

So, where the plaintiff declared, that the defendant being indebted to the plaintiff *pro operi et labori*, &c. promised him, on the 1st April, to pay him the money upon the 1st May, &c.; the defendant pleaded the statute 21 Jac. 1. c. 16. in bar, non assumpsit infra sex annos. It was considered that the plea should have been actio non accrevit, and not non assumpsit (*b*).

In an indebitatus assumpsit, on a promise to pay on demand, the defendant pleaded non assumpsit infra sex annos: the plaintiff demurred, because the plea should have been, that there was no demand within six years, or non assumpsit infra sex annos after demand. But the Court held, that an indebitatus assumpsit shews a debt due at the time of the promise, and therefore the plea good: but if the promise had been of a collateral thing, which would create no debt till demand, it might be otherwise (*c*).

Although the statute should take place from the time of making the promise, yet the plea of actio non accrevit infra sex annos is proper, therefore it has been considered the safest and best way of pleading the statute in all cases of debt on simple contract, or assumpsit, to say, that "the said several causes of action in the said declaration mentioned, or any or either of them, did not accrue to the said plaintiff within six years next before the suing

(*a*) 10 Mod. 104. (*b*) 10 Mod. 206. (*c*) Bul. N. P. 151.

forth of the original writ, or of exhibiting the bill of the said plaintiff (*a*).

In an action by the plaintiff, as assignee of the effects of a bankrupt, he declared that the defendant was indebted to the bankrupt, and being so indebted, promised the plaintiff to pay. The defendant pleaded, that the cause of action did not accrue to the bankrupt within six years. And on demurrer it was held ill, because the plea does not answer to the promise laid in the declaration, and it precludes the plaintiff from proving any promise to himself (*b*).

By Holt, Ch. J. and the Court.—In an action by an assignee of bankrupt by commissioners, on a simple contract, the right way is, to lay the promise to have been to the bankrupt, except there be an express promise, after assignment made, to the assignee. And the way of declaring on a promise to the assignee is very inconvenient, and a means to oust the defendant of the benefit of the Statute of Limitations: for if the goods were sold five years before the assignment by the bankrupt, and then the debt is assigned, and a year passes, and the assignee declares on a promise to himself, it will not be a good plea to say, that the defendant "non assumpsit infra sex annos to the bankrupt," for that does not answer the declaration. And if he plead "non assumpsit infra sex annos to the plaintiff," it will be against him: for if there be any promise transferred by the act, it is only upon the assignment; and the intent of the statute was only to transfer the action, and nothing else.

(*a*) 2 Saund. 63. note 6. (*b*) Str. 919.

Indeed, if after assignment another receive the money, action will lie for the assignee upon a promise to himself; because the receipt of money after assignment is a contract with him; and every contract or agreement, per Holt, Ch. J. is an express promise, not in word, but in deed, which is as strong; and there is no such thing as a promise in law: and that acceptance of a bill of exchange is an express promise to pay it (*a*).

In an action brought under the statute 33 Geo. 3. c. 5. by the assignees of Arthur Miller, an insolvent debtor, discharged out of the Fleet prison, as indorsee of a bill of exchange, against the drawer, the first count of the declaration stated the drawing of the bill, the acceptance by the drawee, the indorsement by the payee to Arthur Miller, before the plaintiffs became such assignees, the refusal of payment by the acceptor, and the protest for non-payment by Miller; of all which premises the defendant afterwards, and before the plaintiffs became such assignees, had notice: by reason whereof he became liable to pay to the said Arthur Miller, &c. and being so liable, and the said sum of money afterwards, and when the said Arthur Miller was so discharged as aforesaid, and the said plaintiffs became such assignees as aforesaid, being due and unpaid, the defendant, in consideration thereof, afterwards, and after the plaintiffs became such assignees as aforesaid, promised to pay them the said sum of money, &c. There was also a count stating that the defendant was indebted to the plaintiffs as assignees, for money paid before the plaintiffs became assignees of Arthur Miller, to the use of the defendant, in consideration of which the defendant promised to pay

(*a*) 6 Mod. 131.

to the plaintiff as assignees, &c. And a similar count, stating the debt to the assignees for money had and received by the defendant, before the plaintiffs became assignees, to the use of Arthur Miller, and a promise to pay to the plaintiffs as assignees; and the breach was, the non-payment to the plaintiffs as assignees, &c. To which the defendant pleaded, after the general issue, "that the said several causes of action in the said declaration mentioned, and each and every of them, first accrued to the said Arthur Miller, before the plaintiffs became such assignees as in the said declaration is mentioned; (to wit) at London, &c. And the said defendant further saith, that six years did elapse after the time when the said several causes of action, and each and every of them, first accrued to the said Arthur Miller, and before the day of suing out of the original writ of the said plaintiffs against the said defendant, and this," &c. To which plea there was a general demurrer.

In support of the demurrer, Heywood, Serjeant, argued, that the plea was no answer to the declaration. In all the counts the promise is stated to have been made to the plaintiffs; and as a breach of promise is the cause of action in assumpsit, no cause of action at all could have accrued to the insolvent. Non assumpsit infra sex annos to a bankrupt, is no plea to assumpsit by the assignees. 6 Mod. 131. *Parkins* v. *Wollaston*. 2 Str. 919. *Skinner* v. *Rebou*. But if the original debt to the insolvent be taken as the cause of action mentioned in the plea, yet there might have been an express promise to the plaintiff, as stated in the declaration, to which allegation there is no answer in the plea.

Le Blanc, Serjeant, *contra*, contended, that the demurrer admitted that the cause of action accrued to the insolvent, and more than six years before the action brought; an express promise, therefore, ought not now to be insisted on; when, if the parties had gone to trial, they would have had nothing to rest on but an implied promise, raised on a consideration which is admitted to be within the Statute of Limitations. If it were allowed the plaintiffs now to insist on an express promise, they would succeed on demurrer by supposing an express promise, and at the trial by supposing an implied one, when, in fact, there was neither, and the defendant clearly entitled to the benefit of the statute. Instead of demurring, they ought to have pleaded an express promise within six years, on which fact the parties might have gone to trial.

Lord Ch. J. Eyre suggested, that the defendant might have pleaded that the debt was first due to the insolvent more than six years before the action was brought, and that he made no promise to the plaintiffs within six years.

Buller, J. seemed to think, that the plaintiffs must prove an express promise at the trial.

Le Blanc then prayed to amend, which, as the defendant had amended once already, was refused (*a*).

Judgment for the plaintiffs.

(*a*) 2 H. Bl. 561.

The conclusion of the plea should be with a verification; for, though in the case of *Duppa* v. *Mayo* (*a*), which was debt for the arrears of a rent-charge, and the statute pleaded, but did not conclude to the country, but with a verification; upon which plea the plaintiff demurred; and judgment was given against the defendant for the bad conclusion of his plea. The learned editor of Saunders' Reports, in his note (2) upon this observes, that as to assumpsit, it is clear that the statute must be pleaded; and it seems questionable whether the same rule would not now be extended to actions of debt. On the one side, the same reasons for pleading the statute seem equally applicable to both actions. The statute contains several exceptions, such as coverture, infancy, imprisonment, and the like, which would take the case out of it in both actions alike. If the statute is not pleaded, the plaintiff is equally liable to be surprized, and therefore not prepared to answer, in one action as in the other. In either case, the statute does not extinguish the debt, but only takes away the remedy; and it is optional whether the defendant will insist upon the statute, or wave it. And it is very usual, in practice, to plead to debt on simple contract, that the cause of action did not accrue within six years; to which the plaintiff may, of course, reply, that he was within any of the exceptions in the statute, or that he sued out a latitat within time, as is the common case in assumpsit. But on the other side, the principal case is an authority to the contrary, viz. that there can be no such special replication; for it is there held, that the plea must conclude to the country; which decision can only be founded upon the ground that the words " infra sex annos" are

(*a*) 1 Saund. 283.

surplusage; for, if the plea of infra sex annos were good, the proper conclusion, it should seem, would be with a verification. However, the modern practice is, to plead the statute in one action as well as the other, and to conclude with a verification.

The old way upon the Statute of Limitations was, for the defendant to plead the statute at large; but of late years, the general pleading of non assumpsit infra sex annos is allowed; therefore—

In an action of debt for rent, the defendant pleaded the Statute of Limitations, and that *causa actionis prædictæ, &c. accrevit* above six years before the writ brought. To this the plaintiff demurred, and the cause of demurrer was upon the late statute for reviving of process, anno primo Willelmi & Mariæ; by which it is provided, in regard there was an interruption of the government, and proceedings of law, from the 11th of December 1688, to the 13th of February following, that the time within those days should not be accounted as any part of the six years to bar an action by the Statute of Limitations, or of the six months for bringing a quare impedit, &c. so as it was urged that the defendant should have shewn that six years and so many days were elapsed as are between the 11th of December and the 13th of February. For the six years may be passed, yet the plaintiff may be within time by reason of the said statute.

But the Court were of opinion that the defendant's plea was well, and this should be shewn of the plaintiff's part; for the statute does not alter the form of pleading, but

but that should be as it was before; and the plaintiff, if the matter will bear it, is to help himself upon the said statute (*a*).

When the statute is pleaded to the entire of a declaration, and is bad as to part, it is bad for the whole.

Assumpsit, in consideration that the plaintiff would deliver to the defendant such a deed; the defendant promised that he would re-deliver it to him on request; and also, in consideration that he had, upon request, delivered to him another deed, the defendant promised to pay him £40. and alledges that he had delivered to him the first deed; and although, at such a day afterwards, he made request, yet he had not re-delivered the first deed, nor paid him the £40. The defendant pleaded the Statute of Limitations, and that he did not promise within six years before the action brought: whereupon the plaintiff demurred; for the cause of action as to the first deed did not arise on the promise, but upon the refusal after request, and the request was within six years. And so held the Court.

Then it was moved, that the payment of the money was to be without request, and therefore the plea was good as to that: to which it was answered, that the plea being intire to both parts of the declaration, and being ill in part, is ill in the whole; whereupon it was adjourned. But at a day afterwards, the Court held the plea ill in the whole, for the reason alledged; and they cited a case between *Bridges and Ade* to have been so adjudged, and gave judgment for the plaintiff for the whole (*b*).

(*a*) 2 Vent. 185. (*b*) 1 Lev. 48.

When pleaded, it should state to the effect, that no cause of action accrued to the plaintiff within the time to which the particular action is limited.

In an action of trespass, assault, and false imprisonment, the defendant pleaded not guilty infra sex annos, and the plaintiff demurred.

And Mr. Serjeant Darnall, for the plaintiff, argued, that the Court, upon this plea, as it was pleaded, would not take any notice of the Statute of Limitations, that if this plea were a good plea, it would be a good replication for the plaintiff to say, that he took out a writ within six years, which is absurd: that no issue could be taken upon this plea; or, if any issue could be taken upon it, yet, if a verdict were found for the plaintiff, no judgment could be given for him; because, though the defendant were guilty within six years, yet he might not be guilty within four. He said, that this plea was a negative pregnant; and though, where a verdict is found upon issue joined upon such a plea, that may, in some cases, make the plea good; yet, it is certainly naught upon demurrer. And for that he cited 12 Edw. 4. c. 6. Br. Negative pregnant, 48. Br. same title, 42.

For the defendant, it was argued, that the Statute of Limitations is a general law, and that those pleas of the Statute of Limitations are never framed upon the statute, but are pleaded generally, without tying them up to, or taking any notice of the act of parliament: that the plaintiff might have taken issue upon this plea, that the defendant was guilty within six years: and that the largeness of the plea taking in two years more than it

needed, was for the benefit of the plaintiff; that if, upon that issue, the jury had found for the defendant, he must have had his judgment, because, if he was not guilty within six years, it was a necessary consequence, that he was not guilty within four years. And that, if the verdict had been found for the plaintiff, he must have had his judgment too, because the plea of the defendant was falsified: like the case of debt upon a single bill, the defendant pleads payment; if, upon issue joined, the verdict be found for the defendant, he cannot have judgment; but otherwise, if it be found for the plaintiff.

Holt, Ch. J. said, that the verdict's helping such a plea as this would not make it a good plea then upon demurrer. This must be a good plea either at Common Law, or upon the statute: it is not a good plea at Common Law, because, at Common Law, a man might bring his action at any time; neither is it a good plea upon the statute, because it does not disclose the matter that the statute makes a bar.

Powell, J. This plea, at best, is but argumentative; and such pleas are never good, especially where the matter that makes the bar is made by such an act of parliament, you ought to plead it in the words of the statute. Besides, if issue had been taken upon this plea, and there had been a verdict for the plaintiff, it would have been a jeofaile.

Holt. How could the plaintiff reply?

*Note.*—When this case was first stirred, in Michaelmas Term, the Court seemed all to be of opinion that

the plea was good, because it gave the plaintiff an advantage (*a*).

But this can only be taken advantage of on special demurrer.

In an action for criminal conversation, the declaration stated, that the defendant, on 1st January 1792, and on divers other days, &c. at, &c. with force and arms made an assault on G. the plaintiff's wife, and there and then seduced her, &c. whereby the plaintiff, &c. and other wrongs to the plaintiff the defendant did, against the peace, &c. and therefore, &c. Pleas, 1st, Not guilty; 2dly, Not guilty of the premises in manner and form, &c. at any time within six years next before the exhibiting of the plaintiff's bill. On general demurrer, a question arose, whether the action were trespass or case.

And by Lord Ellenborough, Ch. J. It might be material to consider that point, if the question now were, whether the limitation of six or of four years only applied to this case: but if the defendant take the longer period, and plead not guilty within six years, that, of course, must include within four years; and the plea not having been specially demurred, is therefore good in either way of considering it (*b*).

In trespass continued for many years, and the Statute of Limitations pleaded, the jury gives damages only for the time within the limitation.

(*a*) Ld. Raym. 1099. (*b*) 6 East. 387.

To an action for assault, battery, wounding, and imprisoning plaintiff, from 10th August, 24 Car. 2. *usque exhibitionem billæ;* to which the defendant pleaded not guilty within six years; and the plaintiff replied, that the writ was sued out the 2d October, 1 Jac. 2. and that the defendant was guilty within six years next before the writ brought. Upon this issue was joined, and a verdict was given for the plaintiff, and entire damages.

Two exceptions were moved in arrest of judgment: 1st. That a verdict cannot help what appears to be otherwise upon the face of the record; that here the plaintiff declares that he was imprisoned the 10th of August, 24 Car. 2. which was thirteen years before; and being one entire trespass, the issue is found as laid in the declaration; which cannot be for so many years between the cause of action and bringing of the writ; for if a trespass be continued several years, the plaintiff must sue only for the last six years for which he hath a complete cause of action: but when those are expired, he is barred by the statute. 2dly. When the plaintiff has any cause of action, then the Statute of Limitations begins (a); as in an action on the case for words, if they be actionable in themselves, without alledging special damage, the plaintiff will recover damages from the time of the speaking, and not according to what loss may follow. So, in trover and conversion, when there is a cause of action vested, and the goods continue in the same possession for seven years afterwards; in such case, it is the first conversion which entitles the plaintiff to an action. So, in the case at bar, though this were a continued imprisonment, yet so

(a) Cro. Car. 319.

much as was before the writ brought was barred by the statute.

On the other hand it was argued, that the verdict was good; for the jury reject the beginning of the trespass, and give damages only for that which falls within the six years; and this may be done, because it is laid *usque exhibitionem billæ*. If the defendant had pleaded not guilty generally, then damages must be for the thirteen years, though the plaintiff, on his own shewing, had brought his action for a thing done beyond the time limited by the statute; but having pleaded "not guilty at any time within six years," if the verdict find him guilty within that time, it is against him. 2dly. As to the objection, that the cause of action arises beyond six years, though it do appear so in the declaration, yet that doth not exclude the plaintiff; for there might have been process out before, or he might be disabled by an outlawry, which may be now reversed; or he might be in prison, and newly discharged, from which time he hath six years to bring his action; for being under either of these circumstances, the statute does not hurt him.

*Curia.*—If an action of false imprisonment be brought for seven years, and the jury find the defendant guilty but for two days, it is a trespass within the declaration. This statute relates to a distinct, and not to a continued act, for after six years it will be difficult to prove a trespass: many accidents may happen within that time, as the death or removal of witnesses, &c.

Judgment was given for the plaintiff (*a*).

(*a*) 3 Mod. 110.

In the report of this case, Show. 493. Sir John Holt, in support of the judgment said, that an action may be brought at any time within six years after his imprisonment, by the proviso in the statute 21 Jac. 1. c. 16. Besides, every day is a new imprisonment, and a new trespass; and the verdict will be intended to be only for six years (*a*), and the time is not material otherwise; and by the Court held well enough.

The defendant may divide the time in an action for false imprisonment, and plead the statute as to part.

The plaintiff brought trespass for imprisoning him, and detaining him in prison from 32 Car. 2. till the 3d of April, 4 Jac. 2. The defendant pleaded as to all, till 34 Car. 2. such a day, not guilty within four years; and as to the rest, a plaint, and a capias issued. The plaintiff demurred.

*Et per Curia.*—Though the imprisonment be complained of as one continued imprisonment, yet the defendant may divide the time, and plead the statute as to part, and the plaintiff may reply the continuance; therefore, as to this, judgment was given against the plaintiff upon his demurrer, but for him as to the rest; because the capias was awarded by the Court *ex officio*, and it did not appear the defendant meddled in it (*b*).

The plaintiff, by his replication to the statute, either affirms that the cause of action accrued within time

(*a*) The plea was bad, being for six years, whereas it should have been, "Not guilty within four years." Ante 226. (*b*) Salk. 420.

before the suit was commenced, that he commenced the suit within time, and continued it up to the time of declaring, relies upon the fourth section, or shews that his action was saved to him by the proviso contained in the seventh section. This part of the subject has been anticipated in treating of the commencing and suing of actions. When the plaintiff replies a latitat, or capias, sued out within time, he must shew that it has been returned and continued by *Vicecomes non misit breve.* It must be a continuance of the same writ or process which was originally sued out, and must appear on the record to be so (*a*).

It is, however, to be observed, that in *Whitehead* v. *Buckland*, Styl. 373. the plaintiff replied an original, but did not shew the continuances upon the roll. It was held that the plea was plain, and that it was not necessary to shew all the continuances, for there was an appearance.

In the case of *Every* v. *Carter* (*b*), the plaintiff replied a clausum fregit within time, but did not plead the continuance.

And where the plaintiff, an attorney of the Common Pleas, sued the defendant by an attachment of privilege, [illegible] Michaelmas Term, 17 Geo. 2. declared that the [illegible] was attached by writ of privilege, &c. and to [illegible]te pleaded, replied, that he sued out a writ of [illegible] the 7th day of July, 16th Geo. 2. and that the [illegible]endant did make such promise within six years [illegible]efore the suing forth the said writ of privilege. [illegible] replication there was a demurrer, and joinder in

(*a*) Ante 150. (*b*) 2 Vent. 259.

demurrer. The Court of Common Pleas were of opinion, that an appearance to process cures all errors and defects therein, and gave judgment for the plaintiff below.

A writ of error was brought, and the general errors assigned. For the defendant in error it was argued, that an attachment of privilege in the Common Pleas is in the nature of an original writ, and if an original writ is replied to the plea of the Statute of Limitations, it is sufficient to shew the teste of it when issued, without any continuances. And of such opinion was the Court (*a*).

The authority of this case is extremely doubtful; for, in an action of assumpsit for fees due to an attorney, the defendant pleaded non assumpsit infra sex annos. The plaintiff replied, that on such a day, two years before, he had sued out an attachment of privilege against the defendant; upon which writ, *taliter processum fuit*, that the defendant (on such a day in Hilary Term, anno 2 Will. &c.) appeared, and the plaintiff declared against him, *modo et forma, &c.* And upon a demurrer to this replication it was held ill, because the plaintiff did not set forth any continuance of this writ of attachment (*per Vicecomes non misit breve*), which was sued out above two years before: for it is impossible that the defendant should appear in Hilary Term, anno 2 Will. to a writ returnable two years before; and no other writ is set forth by the plaintiff. But if the plaintiff, after the *taliter processum fuit*, had shewn the last attachment, and the return thereof, upon which, in truth, the defendant did appear, it had been well enough, without shewing any of the continuances (*b*).

(*a*) 1 Wils. 167. (*b*) Carth. 144.

And where, to an action on the case on promises, the defendant pleaded the Statute of Limitations; the plaintiff replied a clausum fregit sued, returnable in the Common Pleas, before the six years, *ea intentione* to declare in this action upon the case; and did not shew that the writ was continued: and upon demurrer, judgment was given for the defendant (*a*).

And so in *Karver* v. *James* (*b*), and *Stratton* v. *Savignac* (*c*), and in the case of *Kinsey* v. *Heyward* (*d*), it was determined, both in the King's Bench and in parliament, that an original must be returned and continued. And it does not appear in the report of the case in Wilson, that any one of these cases were cited.

But it does not seem necessary, in replying an original or a latitat, to do so with a *pro ut patet per recordum*.

In *Whitehead* v. *Buckland*, Styl. 373. one of the causes of demurrer was, that plaintiff saith he hath sued out his original, but doth not say, *pro ut patet per recordum*.

And in an action on the case on promises, the defendant pleaded the Statute of Limitations, and that non assumpsit infra sex annos. The plaintiff replied, that such a day he took out a writ of latitat, and so continueth it down by a *Vicecomes non misit breve*, and did not conclude *pro ut patet per recordum*, for which cause the defendant demurred. But *per Curiam*, and the clerks—This is needless; the latitat roll being only for the private use of the Court, and no record (*e*).

(*a*) Ld. Raym. 701. (*b*) Wilson 255. (*c*) 3 B. & P. 330.
(*d*) 1 Ld. Raym. 432. (*e*) 2 Keb. 46.

It has been held, that if the bill of Middlesex be sued within the time, the replication will not answer the plea of the Statute of Limitations, if it shew the bill to be returned on the same day it was sued out. Ld. Raym. 772 *Green* v. *Rivett*. But this is not so at the present day; for it is the constant practice to sue out writs returnable on the same day; and the case of *Green* v. *Rivett* was over-ruled by *Oxlade* v. *Davidson*, 4 T. R. 611. The plaintiff may reply a latitat or capias, without shewing either a bill of Middlesex or original preceding.

Coles brought an action of trover and conversion against Sibsye. The defendant pleaded the Statute of Limitation of Actions in bar of the action. The plaintiff replied, that he took out a latitat out of this Court against the defendant within the time limited by the statute, which still continued depending.

Roll, Ch. J. said, A latitat out of this Court is in the nature of an original in the Common Pleas, and so hath been always held to be (*a*).

In *Hollister* v. *Coulson*, Str. 550. the defendant pleaded non assumpsit infra sex annos; the plaintiff replied a latitat; and the Court, on demurrer, held it well enough, without shewing a bill of Middlesex.

Assumpsit upon a promissory note, payable to B. or order, signed by the defendant, and indorsed to the plaintiff, the defendant pleaded the Statute of Limitations; the plaintiff replied a latitat, sued out within the six years, and regularly continued, &c. to which there

(*a*) Styl. 156.

was a rejoinder, and a demurrer to the rejoinder. Which being held ill, it was objected for the defendant, that the plaintiff ought to have shewn a bill of Middlesex as a foundation of the latitat, the latitat referring to it. But adjudged, the replication of the latitat, without shewing a bill of Middlesex precedent, was sufficient to avoid the statute. And so it was adjudged Mich. 9 Geo. B. R. *Hollister* v. *Coulson*, Str. 550. See Stiles 156. 1 Sid. 53. 60. Judgment for plaintiff. So, in *Karver* v. *James*, Willes 257. the Court all agreed that the capias was sufficient, without setting forth the original; it being the constant course of the Court to take out a capias without an original (*a*).

We have seen, that when the statute begins to operate, it runs over all mesne acts (*b*): therefore, if the Statute of Limitations be pleaded to an action brought by an executor on a promise made to his testator, the six years are computed from the time when the cause of action arose, and not from the time of obtaining the probate of the will; and in such case, the plaintiff cannot reply a promise to himself, as that would be clearly a departure in pleading.

To an action on the case on several promises, all laid to be made to the testator in his life-time, with a profert of the letters testamentary, the defendant pleaded, that he did not promise within six years before the obtaining of the original writ of the plaintiffs, who replied the time of suing out the writ; and that, within six years before the day of obtaining thereof, that is to say, on such a day,

(*a*) Ld. Raym. 1441. (*b*) Ante 84.

the letters testamentary aforesaid were duly granted, &c. by which the said action of the plaintiffs accrued to them within six years. This replication is bad, for the time of limitation is computed from the time when the first action accrued to the testator, and not from the time of proving the will. And as it has been ruled, that where all the promises in the declaration are laid to be made to the testator, that an executor cannot give in evidence a promise to himself (*a*) within six years; and if he cannot, setting forth such a promise to himself in his replication, as the executors did in this case, is a departure in pleading (*b*).

But where, to an action by an administrator for money had and received to his use by the defendant, who had received the intestate's money after his death, six years and upwards before the commencement of the action, but within six years after letters of administration granted to the plaintiff, the defendant pleaded the Statute of Limitations, and the plaintiff replied the special matter; it was held, upon demurrer, that the statute was no bar, because this was not a cause of action in the intestate, the money having been received after his death; and the plaintiff's title commenced by taking out letters of administration, before which time no cause of action accrued to him (*c*).

When the plaintiff replies the fourth section, he states, that he obtained a judgment which was reversed, and that he now sues within a year after the reversal; or that he obtained a verdict, and judgment was arrested; or the plaintiff may say, in his replication, that he sued out an original upon which the defendant was outlawed, or the

(*a*) Salk. 28. ante 163. (*b*) Willes 27. (*c*) Salk. 421. Carth. 335.

outlawry was afterwards avoided by plea, or reversed on error, and he sued within a year (*a*).

So, where, within the equity of the fourth section, the executor, &c. brings a new action (*b*), recently after the death of the testator, the replication states, that the testator, on, &c. in such a term, in such a year of the king's reign, sued out a capias ad respondendum, (for instance) against the defendant, rereturnable on the morrow of All-souls, that the sheriff returned, that the defendant was not found in his bailiwick; and then continue the capias from term to term, down to the time of the testator's death; that he appointed the plaintiff his executor, recently after whose death, to wit, in such a term, &c. the plaintiff sued out the writ upon which the action is founded; that the several writs so prosecuted by the testator against the defendant were with an intent to have impleaded the defendant, upon the several promises in the declaration specified; and that the writ sued out by the plaintiff against the defendant was prosecuted against him with the intent to implead him for the causes of action in the declaration specified; and upon his appearance, to declare against him for the said several causes of action, and that he afterwards, on, &c. declared against the defendant, &c. with an averment, that the several causes of action accrued within six years next before the suing out of the writ of capias ad respondendum first above specified, by the testator, &c. (*c*)

All these special replications conclude with a verification, to give the defendant an opportunity of answering the special matter. And where a latitat is replied to avoid the Statute of Limitations, the defendant may, in his

(*a*) 2 Saund. 63 *g*. n. 6. ante 164-5. (*b*) Ante 163. (*c*) 2 Saund. 64 *a*. n. 6.

rejoinder, shew the true time of suing out the writ, though an averment contrary to the record (*a*).

A variance in the replication from the declaration, in an immaterial matter, is no departure.

Trover and conversion of a ship and nine pieces of ————; and declares, that 1st March, 21 Jac. 1. he was possessed of, and the same day lost them, which came to the defendant's hand, who, 3d October, 3 Car. 1. converted them to his proper use. The defendant pleaded the Statute of Limitations; and that the 20th March, 19 Jac. 1. causa actionis accrevit; so as not only three years and more are incurred since the parliament, but also six years after the conversion before any action commenced; *et hoc, &c.* The plaintiffs replied, that they were possessed of the said ship as of their proper goods; and so being possessed before the 20th March, 19 Jac. 1. viz. 1st March, 19 Jac. 1. they agreed at London aforesaid, *in parochiâ et wardâ prædictâ*, that the said defendant, as their servant, should transport the said ship and goods to T. in Spain, being parts beyond seas, and should afterwards restore them to the plaintiffs upon request; whereupon the defendant, taking the said ship the said 1st March, 19 Jac. 1. transported her to parts beyond seas, viz. to T. and 20th March, 19 Jac. 1. there sold the said ship and goods to persons unknown, and converted them to his proper use: and that the defendant, after the said conversion, remained *in partibus transmarinis usque* 1 May, 1 Car. 1. by reason of which stay they could not sue him *per legem terræ:* and that, 1 May, 1 Car. 1. he returned; whereupon, 1st October, 3 Car. 1. at

(*a*) Burr. 962. Ante 119.

London, they required him to deliver the said ship and goods, which to do he refused; but the said ship and goods, *ad hunc et ibidem*, converted and disposed *prout superius continetur; et hoc, &c.* And upon this replication the defendant demurred.

It was urged, that here the replication was a departure from the declaration; for, by the declaration the plaintiffs suppose a casual loss, and a trover by the defendant, 1st March, 21 Jac. 1. but in the replication they suppose an agreement to transport the said ship and goods, and afterwards to restore them to the plaintiffs; and that the defendant sold and converted them to his proper use the 20th March, 19 Jac. 1. and so a variation between the declaration and replication in the time and manner how the defendant had them (*a*).

Richardson, Jones, and Berkley, Js. held, that the replication was no departure, but was pursuant to the count, and fortifies it; but Croke, J. conceived it was a departure, because it varies in the matter and in the time; for the declaration supposeth a possession of the goods, and that 1st March, 21 Jac. 1. he lost them, and the same day the defendant found them; and the 1st October, 3 Car. 1. converted them: and the plaintiff, in his replications, shews, that he, the said 1st March, 19 Jac. 1. delivered them to the defendant, to transport them to T. in Spain, and to redeliver them upon request; and after shews, that the defendant, 21st March, 19 Jac. 1. at St. T. sold and converted them to his own use; so it varies in the point

(*a*) Cro. Car. 245.

how the goods came to the defendant's hands, both for the matter and time (*a*).

In assumpsit, on a promise made the 1st May, 3 Car. 1. for money lent, the defendant pleaded, that the writ was first brought the 4th February, 14 Car. 2. and that he did not promise within six years before the said 4th of February. The plaintiff replied, that he assumed within six years before the said 4th of February. And after verdict, it was moved in arrest of judgment, for that the replication was a departure from the count.

But by the Court—The replication is no departure from the declaration; for the time put in the declaration was not material, for he might declare of an assumpsit at any time; but when the defendant makes the time material by his plea, the plaintiff may, by his replication, answer to that plea, for maintaining his action, by the time that before was not material.

And they gave judgment for the plaintiff (*b*).

And also, where the defendant, at the parish of Bow, in the ward of Cheap, London, was indebted to the plaintiff, he promised to pay, &c. The defendant pleaded the statute; and the plaintiff replied, that the debt was contracted at Teneriffe, beyond sea, viz. in the parish and ward aforesaid; and that, within six years after his return, he brought the action. The defendant demurred, for that the replication was a departure from the declaration, which lays the indebitatus at Bow, in London, and the replication is at Teneriffe, beyond sea.

(*a*) Cro. Car. 245. 333. (*b*) 1 Lev. 110.

But by the Court—'Tis well enough, it also saying in the parish and ward aforesaid (*u*).

The plaintiff declared upon a promise made the 16th of January 1706. The defendant pleaded in bar the Statute of Limitations; and that the cause of action did not accrue within six years before the exhibiting of the bill. The plaintiff replied, the bill was exhibited the 23d January 1713, and that cause of action did arise within six years before exhibiting the bill. To this the defendant demurred.

Parker, Ch. J. delivered the resolution of the Court.—Judgment must be given for the plaintiff; for this being the case of a parol promise, the day in the declaration is not material; and therefore, the plaintiff, in his replication, has only departed from an immaterial part of his declaration, which would be cured by a verdict, and is now aided upon a general demurrer, by statute for amendment of the law. Were it more than matter of form, a verdict finding the promise at another day could never cure it, as most certainly it would. And for this purpose was quoted the case of *Lee* v. *Rogers*, where this learning is laid down, that for the plaintiff to vary from the time or place in his declaration, in order to follow the defendant's plea, is not a departure. In the old books, indeed, this would have been a departure. And unless what, strictly speaking, is a departure, be sometimes allowed; unless the plaintiff, where the defendant, by his justification, makes the time or place material, may follow the defendant's plea, though it

(*u*) 1 Lev. 113.

lead him to another time or place; all that doctrine, that in transitory actions, where time and place are not material, the plaintiff may declare at any time or place, must fall to the ground.

Judgment for the plaintiff (*a*).

(*a*) 10 Mod. 248.

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